


REPORTS OF CASES ARGUED AND
DETERMINED IN THE SUPREME COURT OF
THE STATE OF WISCONSIN, VOLUME 12...

WISCONSIN. SUPREME COURT, ABRAM DANIEL SMITH, PHILIP LORING
SPOONER, OBADIAH MILTON CONOVER, FREDERIC KING CONOVER



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Reports Of Cases Argued And Determined In The Supreme Court Of The State Of Wisconsin, Volume 12...

Wisconsin. Supreme Court, Abram Daniel Smith, Philip Loring
Spooner, Obadiah Milton Conover, Frederic King Conover

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Wisconsin Supreme Court 16
REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY PHILIP L. SPOONER,
OFFICIAL REPORTER.

VOLUME XII.

CONTAINING THE CASES DECIDED AT THE JANUARY TERM, 1860, NOT
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 For Table of Errata, see last page.

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF WISCONSIN,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. LUTHER S. DIXON, Chief Justice.

HON. ORSAMUS COLE, }
HON. BYRON PAINE, } Associate Justices.

Attorney General, - Hon. JAMES H. HOWE.

Clerk, LA FAYETTE KELLOGG, Esq.

LIST OF ATTORNEYS

ADMITTED TO PRACTICE

IN THE SUPREME COURT,

From March 1st to November 19th, 1860.

E. HOOKER, . . .	March 1st, 1860,	Waupun.
J. BOWMAN, . . .	" " "	Newport.
S. K. VAUGHAN, . . .	" 2d "	Portage City.
N. V. WHEELER, . . .	" " "	Baraboo.
JOHN C. NEVILLE, . . .	" 6th "	Green Bay.
N. H. DALE, . . .	" 7th "	Racine.
EDSON KELLOGG, . . .	" 9th "	Whitewater.
O. S. HEAD, . . .	" 13th "	Kenosha.
WM. A. MONTGOMERY, . . .	" 16th "	Madison.
EDWIN F. TOWNSEND, . . .	" 26th "	Milwaukee.
RUFUS KING, . . .	July 13th, 1860,	Prairie du Chien.
HUGH CAMERON, . . .	" " "	La Crosse.
WM. F. VILAS, . . .	" " "	Madison.
E. E. BOIES, . . .	" " "	Janesville.
J. S. PRESCOTT, . . .	" 17th "	Prescott.
GERRIT F. THORN, . . .	" 30th "	Jefferson.
IRA E. LEONARD, . . .	" 31st "	Watertown.
ANGUS CAMERON, . . .	August 7th, 1860,	La Crosse.
CHAS. E. PIKE, . . .	" 8th "	Oshkosh.
F. H. HEAD, . . .	" 13th "	Kenosha.
P. G. BUCHAN, . . .	" 15th "	Milwaukee.
EDWARD J. HILL, . . .	" " "	" "
H. B. LIGHTHIZER, . . .	" 28th "	Madison.
ISAAC S. CLARK, . . .	November 19th, 1860,	Milwaukee.

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IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN.

ROBBINS vs. LINCOLN.

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1860.

12	1
76	257
12	1
78	490
12	1
90	411

A performed services for the firm of *B & C*, and had an account against *C*, individually, for labor &c., and payments were received by him from *C* to an amount more than sufficient to pay for the services rendered to the firm, without any direction as to which account the payments should be applied upon, and *C*, upon the dissolution of his partnership with *B*, assumed to pay all the firm debts, and afterwards had a reckoning with *A*, of all the accounts between *A*, and the firm, and himself individually, and promised *A*, to pay him the balance found due, which was less than the amount of his original account against *C* alone: *Held*, in a suit by *A* against *C* to recover said balance, there was no error in making such an application of the payments to the firm debt, as would allow *A* to recover of *C*, the balance so due and promised.

An instruction given by the court to the jury, in such case, that the plaintiff might recover of *C* for the firm debt, is no ground for reversing the judgment, which was only for the balance above mentioned, as the same result must have been arrived at by an equitable application of the payments.

A complaint alleged that the "defendant was indebted to the plaintiff for money laid out and expended by the plaintiff for the defendant at his request," giving a large number of items. The answer denied that "plaintiff had laid out or expended any money for the defendant, except such sums as had been delivered by him to the plaintiff for that purpose." *Held*, that such answer is not a denial, but rather an admission, that the plaintiff paid out the moneys specified in the complaint, with an avoidance of liability for the same, by the averment that the money paid had been furnished to the plaintiff by the defendant for that purpose.

The answer also averred that "the defendant had no knowledge or information sufficient to form a belief, whether the plaintiff had laid out and expended all the sums of money delivered by the defendant to the plaintiff for that pur-

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pose, and therefore had no knowledge, &c., whether he was, or on a final accounting would be, indebted to the plaintiff: *Held*, that this denial was consistent with a full knowledge that plaintiff had paid out all the moneys alleged in the *complaint* to have been paid by him, and in strictness of pleading was not such a denial of the paying out of the moneys mentioned in the complaint, as to put the plaintiff upon the proof thereof.

It seems that the deposition of a witness taken in this state is not admissible in evidence, if the certificate of the officer before whom it was taken, state as the only reason for taking it, "that the deponent is going out of the state," although the party offering the deposition testifies on the trial that the witness was still absent from the state.

A judgment will not be reversed on account of the admission of such a deposition, where it appears that the verdict of the jury, who tried the case, could not properly have been different, if the deposition had been excluded.

ERROR to the County Court of *Dane County*.

The complaint of *Lincoln*, the plaintiff below, alleged that the defendant, *Robbins*, was indebted to him for money laid out and expended by him, and for work done and performed by him and his wife, for the defendant, at his request, and for a promissory note executed by one *Francis Massing*, payable to the plaintiff, and by him sold and delivered to the defendant, at his request, the several items of which indebtedness were as follows:

[Here follow various items of cash alleged to have been paid out by the plaintiff for the defendant, amounting to \$2,204 49, and also the following:]

1858.	Nov. 18.	To Massing's note sold you,	-	\$676	08
		interest on same,	-	10	00
1859.	Jan. 1.	To 1 year's work of self,	-	400	00
		" 2 months work of plaintiff's wife,		16	00

The complaint further stated that the sum of \$2,825 95 of the said indebtedness had been paid, and that there was due from the defendant to the plaintiff the sum of \$480 62 with interest, for which plaintiff demanded judgment.

The answer of the defendant denied that the plaintiff had laid out or expended any money for him, except such sums as had been delivered by him to the plaintiff for that purpose, and denied that he was indebted to the plaintiff in any sum therefor. The defendant also denied that he was indebted to the plaintiff for one year's services, performed by him as stated in the complaint, but on the contrary, alleged

that during a portion of the time when said services were performed, to wit, from January, 1858, to the 6th of July, 1858, the plaintiff was in the employment of the firm of "*Tweed & Robbins*," (composed of John P. Tweed and the defendant) and not of the defendant individually; that the plaintiff was never in the employment of the defendant, individually, except for about six months, commencing on the 6th of July, 1858, and during that time was, by agreement, to be paid at the rate of \$300 per year; that the defendant was not indebted for the services of the plaintiff's wife, but that the same had been paid for, by her board at the house of the defendant; that the defendant had no knowledge or information sufficient to form a belief, whether the plaintiff had laid out and expended all the sums of money delivered by the defendant to him for that purpose, as aforesaid, and therefore had no knowledge or information sufficient to form a belief, whether he was, upon a final accounting, indebted to the plaintiff in any sum whatever.

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The plaintiff replied, denying every allegation of the answer tending to constitute a counter claim.

On the trial, the plaintiff was sworn as a witness in his own behalf.

The defendant, by his counsel, objected to any evidence being introduced under the complaint, except for work and labor, and the court ruled that the testimony should be confined to the several items of account, not relating to cash received from the defendant and laid out for his use. The plaintiff testified substantially as follows: "I commenced working for the defendant, October 22, 1857, at the price of \$400 per year. I staid there until March, 1859. I charged for my entire work, \$400, and for my wife's extra work, \$16. I let defendant have a note of *Francis Massing* for \$676 08. This note was in the account when we settled."

Upon cross examination he said: "*Mr. Robbins* told me that *Tweed & Robbins* owned and carried on the farm in company; he told me *Mr. Tweed* owned one-half the farm. A little before the 1st of July, 1858, *Mr. Robbins* reckoned up all accounts, and about the 6th of July, 1858, he said he had purchased *Tweed's* interest and assumed all the debts for the

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farm, and this among the rest, and promised to pay it. Up to the 6th of July, the books were kept in the name of *Tweed & Robbins*; after that time, the accounts were kept in *Robbins'* name; I worked for *Tweed & Robbins* until the 6th of July. When we settled, there was \$963 55, besides the interest and my wife's work, due me. In February, his brother paid me \$125, and has paid me in all \$525. I told defendant I should charge for my wife's work after the year was up, and he said he would pay it."

On the trial, the plaintiff offered to read in evidence the deposition of one *Burwell*, taken in the city of Madison, on the 29th of August, 1859. The notice of the taking of this deposition did not state any reason for the taking thereof, and the only reason for taking it, mentioned in the certificate of the justice of the peace before whom it was taken, was "that the deponent, *O. W. Burwell*, is going out of the state." The certificate states that the attorney for the defendant attended at the taking of the deposition, but it is stated in the caption of the deposition that the defendant's attorney objected to the sufficiency of the notice of the taking of the same. The defendant objected to the reading of the deposition, on the ground that the notice and the certificate of the justice specified no sufficient reason for taking it. The court thereupon asked the witness *Lincoln*, if the said *Burwell* was then (at the time of the trial) absent from this state, who replied that said *Burwell* was so absent; whereupon the objection was overruled by the court, and the deposition read in evidence, the defendant's counsel excepting thereto. The deposition was in substance as follows: "Last May the defendant *Robbins* said that he should have paid *Lincoln* the \$600, or thereabouts, that was due him, if *Lincoln* had not sued him, but now he should keep him out of it as long as he could and make it cost him more than the claim. I was at *Robbins'* while the plaintiff's wife was working in his family. In my opinion her labor was worth two dollars per week; *Mr. Robbins* told me he should make *Mr. Lincoln* prove what he had done with the money." This being all the testimony in the case, the judge of the county court charged the jury, among other things, as follows:

"If the jury find that the defendant, after the dissolution of the firm of *Tweed & Robbins*, promised the plaintiff to pay him for his work, done while in the employ of said firm, then the plaintiff may recover for the same in this action," to the giving of which instruction the defendant's counsel excepted.

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The counsel for the defendant requested the court to charge the jury as follows: "That if they found from the evidence that the plaintiff worked upon said farm for the firm of *Tweed & Robbins*, during the time, or any portion of the time, for which he has charged for his services in the complaint in this action, then he could not recover for his services for such time, in this action, against *Robbins* alone," which instruction the court refused to give, the defendant's counsel duly excepting to the refusal. The jury having found a verdict for the plaintiff for \$510 21, the defendant moved for a new trial, upon the ground that the court erred in all the several rulings upon the trial to which the defendant had excepted, and because the verdict was contrary to law and to evidence, and "because there were other errors apparent in the pleadings and proceedings." Which motion the court overruled and rendered judgment upon the verdict.

Smith, Keyes & Gay for plaintiff in error:

I. The court erred in admitting the deposition of *Burwell*, because the certificate of the justice did not disclose any sufficient reason for the taking thereof, as required by statute, and the omission could not be aided or supplied by parol testimony. *Reading vs. Weston*, 7 Conn., 143; *Amory vs. Fellowes*, 5 Mass., 219; *Collins vs. Elliott*, 1 Har. & J., 1; *Winoskie T. Co., vs. Ridley*, 8th Vt., 405.

II. The promise of *Robbins* to pay for work which had been performed for the firm cannot avail the plaintiff in this action, because the alleged new promise to *Lincoln* was not supported by any consideration, moving from the latter, and because the promise was void under the statute of frauds, being a promise to pay the debt of another, and not in writing. 1 Chitty on Pleadings, p. 47; 17 Johns. Rep., 340; *Emerick vs. Sanders*, 1 Wis. Rep., 77, 97, 101.

III. The promise is not available to the plaintiff in this

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action, because it is not sued upon. The plaintiff complains only for work and labor performed for the defendant *Robbins*; he can therefore recover in this action only for work performed for *Robbins* individually. There was in this respect a fatal variance between the allegation of the plaintiff and the proof. *Maynard vs. Tidball*, 2 Wis., 34, 41.

Carpenter & Sprague, contra.

I. If the deposition of *Burwell* was incorrectly admitted the judgment should not be reversed, as the plaintiff's case was fully proved without it. *Prince vs. Shepard*, 9 Pick. Rep., 183; *Benjamin vs. Smith*, 12 Wend., 404; *Gardenier vs. Tubbs*, 21 Wend., 169.

II. Several payments have been made by the plaintiff in error since the dissolution of the firm of *Tweed & Robbins*, and neither party making an application of them, the law makes it to the oldest debt, which is the firm debt, that having become due on the dissolution of the firm, July 6th, 1858. The payments were more than sufficient to pay the firm debt, and hence that debt is discharged. The application having been properly made by the jury, the plaintiff in error has no cause of complaint. *Fairchild vs. Holly et al.*, 10 Conn., 175; Story on Contracts, §§ 578-673.

III. If the jury have come to a correct result, the judgment will not be reversed, though the charge of the Court was erroneous, neither will a new trial be granted unless the court can see that injustice either was, or might have been done, on the former trial. *Kelsey vs. Hanmer*, 18 Conn., 320; *Bowren vs. Campbell and Smith*, 5 Wis., 187.

June 4.

By the Court, PAINE, J. It may be conceded that in strict law the plaintiff could not have recovered in this action against *Robbins* alone, for any part of the debt which accrued against *Tweed & Robbins*, all of which, it appears from the evidence, *Robbins* assumed, and promised the plaintiff to pay, when he bought out the interest of *Tweed*. There are authorities sustaining his right to recover upon such a state of facts. But even if he could not, it clearly appears both from the pleadings and the evidence, that a much larger amount than the balance claimed, was the individual debt of *Robbins* alone.

And that being so, no application of payments having been shown to be made by *Robbins*, at the time of paying, the creditor would have had the right to apply them as he pleased, or in the absence of an application by him, the court should have made such an application as would be equitable under all the circumstances. *Stone v. Talbot*, 4 Wis., 442. *Same case*, since decided by this court, and not yet reported. And we are clearly of opinion, that in this case, if the indebtedness was established so as to permit it, such an application of the payments should have been made, as would have allowed the plaintiff to recover the balance due, if any, in this suit. And we think the indebtedness, both against the partnership and against *Robbins* individually, was sufficiently admitted by the pleadings and established by the evidence, to justify such an application. And in the first place, the condition of the pleadings has a very important bearing upon the case. It is to be observed that the answer does not deny the facts out of which the partnership indebtedness arose, but admits them, or rather sets them up as a defense against the claim upon *Robbins* individually. It states that from January to July, the plaintiff worked for *Tweed* and *Robbins*, and admits that for six months after that, he worked for *Robbins* solely. Thus the substance of the allegations upon this point, is not a denial of the services alleged in the complaint, but a claim that for half of the time, they were rendered for *Tweed & Robbins*, and that for this part the defendant was not singly responsible. The answer does deny that the plaintiff was to receive \$400 per year, and avers that he was to receive only \$300. But from the manner in which the case was submitted to the jury they necessarily passed upon this point, and must have found that the allegations of the complaint were true, as on the evidence they could not have found otherwise, there being none offered on the part of the defendant. The partnership indebtedness was therefore sufficiently admitted and established to justify an application of the payments credited in the complaint thereto. And though the judge did not submit it to the jury with reference to this question, but under instructions that the plaintiff might recover, even for the partnership indebted-

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ness, and though this instruction might not have been technically correct, we still think the same result must have been arrived at by an equitable application of the payments, and should not feel bound therefore for that reason to reverse the judgment. But we do not say that this instruction was erroneous.

The allegation in the complaint, of the sale to the defendant of *Massing's* note, is not denied at all. The rendition of the services by the plaintiff's wife, is not denied, but the answer avers that they were paid for in a particular manner, and to establish that, the burden of proof was on the defendant. It is evident therefore that the answer, so far, put in issue only the questions, whether the plaintiff was to have \$400 or \$300 per year for his services; whether for half the time he worked for *Tweed & Robbins*; and whether the wife's services had been paid for. Do the remaining allegations give it a different effect? They relate to the sums averred in the complaint to have been paid out by the plaintiff for the use of the defendant. The first part of the answer denies that the plaintiff had laid out or expended any money for the defendant at his request, "except such sums as had been delivered by him to the plaintiff, while the plaintiff was in his employ, for that purpose." This is clearly no denial that the plaintiff paid out the money, but on the contrary impliedly admits it. It avoids the liability, by averring that the money paid out, had been in fact furnished by the defendant for that purpose, and is like the answer in *Hamilton vs. Hough*, 13 How. Pr. R., 14, where the answer denied that the plaintiff had sold the defendant any goods that had not been paid for, which the Court held not to amount to a denial.

The latter part of the denial, avers that the defendant had no knowledge or information sufficient to form a belief, whether the plaintiff "had laid out and expended all the sums of money delivered by the defendant to the plaintiff for that purpose as aforesaid, and therefore had no knowledge or information sufficient to form a belief whether he was, or on a final accounting with the plaintiff, would be, indebted to the plaintiff in any sum whatever." The latter part of this

clause relates only to the legal conclusion of indebtedness, and if it contained a positive denial of indebtedness without denying the facts alleged, out of which the indebtedness would arise, it would amount to nothing. *Drake vs. Cockroft* 10 How. Pr. R., 877. Its effect depends therefore on the first clause, and it is very evident that if this referred expressly to the allegations of the complaint, it would be very objectionable in point of form. The complaint avers that the plaintiff paid out for the defendant divers sums of money, giving a great number of items. Suppose the answer should contain a specific denial that *all* those sums were paid out. Such a denial is not inconsistent with a perfect knowledge that all but one had been paid out. A denial in the precise language of the complaint is not sufficient; it must be of the substance of the allegation. And the rule as to answers in equity has been held applicable to answers under the code. And under that rule, "it is not enough when a charge is made with all the circumstances of time and place, &c., to deny such charge generally in the words thereof, but in all cases where the charge embraces several particulars, *the answer should be in the disjunctive, denying each particular or admitting some and denying others according to the fact.*" Van Santvoord PL, 426. It seems very obvious that to a complaint for goods sold and delivered, a denial that the plaintiff had sold and delivered *all* the goods mentioned, would be insufficient. But the denial in this answer does not even amount to that. As before observed, the first part of it is simply a denial that the plaintiff had paid out any moneys, except such as the defendant had furnished him for the purpose. This implies that he had furnished the plaintiff moneys to be paid out, but contains no averment as to how much. The last part of the answer is a denial of knowledge or information sufficient to form a belief, not as to whether the plaintiff had paid out all the moneys averred in the complaint, but all which the "defendant had furnished as aforesaid." He might have furnished more than the complaint claimed to have been paid out, and then the answer would have been consistent with a perfect knowledge that the plaintiff had paid all he alleged. It seems clear, therefore that an answer aver-

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ring by inference that the defendant had furnished the plaintiff moneys to pay out, and then denying knowledge or information as to whether he had paid it all out, cannot be construed into a denial of knowledge that the plaintiff had paid out certain sums mentioned in the complaint. I think therefore, that, as a matter of strict pleading, the allegations in the complaint as to the paying out of money were not sufficiently denied to put the plaintiff upon the proofs.

And though this point was not made upon the argument, I have examined it the more closely by reason of the effect that a sufficient denial in this respect, would have had upon our conclusion as to the application of the payments, which latter point was urged by the respondent's counsel. For on the trial the evidence offered by the plaintiff to prove these items, was objected to, and excluded by the court. And it is very evident that if they are left out, even though all the other items sued for were fully established, the payments admitted by the complaint were more than enough to overbalance them; and therefore no such application of payments could have been made, as would leave any balance for the plaintiff. But, though it does not appear of record, it would seem that this evidence must have been excluded upon a mutual understanding that these items were for moneys which the plaintiff had paid out as agent of the defendant and the latter had furnished, and which the plaintiff had credited among the payments admitted in the complaint. For the whole contest after its exclusion, both in the court below and here, was upon the other items and the questions arising thereon, when, if this evidence was properly excluded, with the burden of proof on the plaintiff to establish those items, that was an end of the case. But we think this effect was not produced, for the reason that they were not sufficiently denied by the answer.

The only other question was as to the admissibility of the deposition. It was objected to, for the reason that it did not show any legal reason for taking it, the certificate stating only that the witness was going out of the state, but not that he would not return in time for the trial. We are inclined to think that under the strict rules prevailing as to the tak-

ing of depositions, this objection was correct. But we are still obliged to affirm the judgment, for the reason that if it had been excluded the verdict could not have been different upon the testimony. No material fact was testified to in it, which was not established by other evidence upon which there was no conflict. It was suggested that the value of the wife's services was not otherwise shown. But the plaintiff himself testified that it was \$16; the complaint alleged an indebtedness of \$16 for her services, and the answer only avoids these allegations by averring payment, but not by denial.

The judgment must be affirmed with costs.

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A complaint, under what is commonly called the "Mill Dam Act," alleged that the plaintiff was, and for more than three years had been, the owner in fee, and actually possessed of certain lands therein described; that during all that time, he had the right to the use and profits of said land; that the defendant, for more than three years last past, had kept up and maintained, across a stream (not navigable,) a mill dam, to raise the water for working a grist mill, &c., by means whereof the water of said stream had, during all that time, been caused to set back upon and overflow the said land, and deprive the plaintiff of the use thereof, which was of the value of \$350 per year, and demanded judgment, that said damages be assessed under the provisions of the statute, &c.: *Held*, that the complaint showed a good cause of action.

APPEAL from the Circuit Court of *Jefferson* County.

This was an action under what is commonly called the "Mill Dam Act," commenced in 1859. The complaint alleges that the plaintiff is, and ever since the 4th of June, 1855, has been, the owner in fee, and actually possessed of certain land therein described, and, during all that time, has had the right to the use and profits of said land; that the defendant, for more than three years last past, has kept up and maintained, across a stream (not navigable,) a mill dam, to raise the water for working a grist mill, &c., by means whereof the water of said stream has, during all that time

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been obstructed and caused to set back upon and overflow the said land, and deprive the plaintiff of the use thereof, which was of the value of \$350 per year, and make it valueless; wherefore the plaintiff demands judgment, that the damages he has already sustained in the premises be assessed, under the provisions of the statute, and also for all damages which may hereafter be occasioned to the premises in consequence of such flowage.

Demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and specifying the following objections:

1. It does not show that any of said plaintiff's land is overflowed, which was not flowed before the erection of said dam.
2. It does not show that said land, so overflowed, was of any value before the erection of said dam, or that the same would be of any greater value than now, if said water was off.
3. It does not show that said dam caused the waters of said river to overflow its banks, or flow out of its natural bed.
4. It does not show that no compensation has been made for the damages caused by said flowing.
5. It does not show that the height to which the defendant might raise the water by said dam, has not been settled by contract or otherwise.
6. It does not show that defendant had wrongfully erected or maintained said dam, or caused said land to be overflowed, nor but that he had a perfect right to do so, without paying damages to the plaintiff on account thereof.
7. It does not show when said dam was erected.
8. It does not show whether or not plaintiff's land was so overflowed when he acquired title, nor but that he purchased the same subject to defendant's right to overflow the part now alleged to be overflowed.
9. It does not show that defendant has ever had any notice that said dam caused said water to overflow the plaintiff's land, nor that the plaintiff sustained any damage on account thereof.
10. It does not show that defendant has been requested to take said water off from said land, or to make compensation to plaintiff for damages.
11. It does not show that plaintiff has sustained damages, by reason of the maintenance of said dam, over and above the benefits to him occasioned by said dam.
12. No civil action can be

maintained against a party for flowing land, upon such facts as are stated in said complaint.

The circuit court overruled said demurrer, and from the order overruling the same, the defendant appealed.

Gill, Barber and Fribert, for appellant:

The plaintiff is not entitled to compensation for injury done his land by the overflowing of the water, caused by the dam, because it does not appear by the complaint, that he was the owner of the flowed land, when it was first overflowed, that is, when the dam was erected; and unless he was the owner at that time, he has sustained no injury, has had no property taken from him, and hence is not entitled to compensation. This court has sustained the constitutionality of the present mill dam law, solely upon the theory that the flowing of land by the erection of a mill dam, is taking private property for public use. 1 Chand., 71; 3 Wis., 461; 3 id., 603. The taking is complete when the dam is erected and the land first flowed, and the rights of the owner to so much land as is flowed, are thereby divested, and he, in lieu thereof, has a claim against the taker, (the mill dam owner,) for compensation, which is but a *chose in action*, in the nature of a claim for purchase money; and if he dies before it is paid, it will belong to his personal representatives, and not to the heir; and the measure of damages in such cases, is the depreciation in the market value of the land at the time of the taking. It follows, that no one but the owner of the land at the time it is taken for public use, can recover compensation, for he alone has sustained the injury, and his grantee takes subject to a privilege, or easement, which, in judgment of law, may be coextensive with and permanent as the land itself. 8 Cushing, 278; 4 Cushing, 469; 7 Met., 78; 5 Met., 81; 2 Met., 558; 12 Pick., 482; 7 Serg. & Rawle, 420; *Turnpike road vs. Brosi*, 22 Penn. State Rep., 32; *Reese vs. Adams*, 16 Serg. & Rawle, 40; *Zimmerman vs. the Union Canal Company*, 1 Watts & Serg., 354.

Enos & Hall, for respondent:

The statute indicates what the complaint should contain, and the complaint in this case complies with its requirements.

"The flowing of land by a mill owner is not a disseisin of

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the owner of the land ; and therefore, if such flowed land is conveyed by the owner, the grantee may maintain a complaint against the mill owner for damage done by such flowing." *Charles vs. The Monson & Brimfield Manuf. Co.*, 17 Pick., 70.

June 4.

By the Court, COLE, J. This was an action commenced under chapter 56, R. S., for damages sustained by the flowing of the lands of the respondent. The appellant demurred to the complaint, assigning several grounds of demurrer, which we do not deem it necessary to notice in detail. It appears to us that all the serious objections taken to the complaint, are substantially embraced in the position, that it is not alleged that the respondent was the owner of the land overflowed when the dam was erected, or that no compensation has been made for the injury caused by the flowing. An examination of the complaint clearly shows that it sets forth a good cause of action. It avers, in substance, that the respondent is now, and ever since the 4th day of June, 1855, has been *the owner in fee*, and actually possessed of certain lands therein described ; that ever since that day, and until the present time, he has had the right to the use and profits thereof ; that the appellant now, and for more than three years past, has kept up and maintained the dam which has caused the waters to flow back on the lands mentioned in the complaint, whereby he has been deprived of the use of said lands, and the same have become valueless, &c. He demands judgment, that the damages he has already sustained in the premises be assessed under the provisions of the statute, and also for compensation for all damages which may hereafter be occasioned to the premises forever, in consequence of such flowage.

We do not suppose that it is essential to a complaint of this kind, to negative every possible defense which may exist to the action, and therefore, it was not necessary for the respondent to allege that no compensation had been made for the injury sustained. If compensation had been made, it was a proper matter of defense, and would properly be set up in an answer to the complaint.

Again, it is insisted that the complaint is defective because it does not allege that the respondent was the owner of the land when the dam was erected. It is said, in support of this objection, that the flowing of land by the erection of a mill dam, is taking private property for public use; that the taking is complete when the land is first flowed, and that the rights of the then owner to so much land as is flowed, are thereby divested, and in lieu of the estate taken, he has a claim against the mill dam owner for compensation in the nature of a claim for purchase money; and therefore, unless the respondent was the owner of the land when it was first overflowed, it is contended that he has sustained no injury, has had no property taken from him, and is entitled to no compensation.

It does not become necessary to determine, in this case, the question as to whether the owner of land at the time it is flowed, can alone maintain an action, not only for damages already sustained, but also for damages which may subsequently accrue, after its alienation, by reason of keeping up the dam. It is very obvious that the statute has in view two objects: to give a remedy for damages already sustained, and an estimate of the damages, gross or annual, which may afterwards be incurred. In the case of *Walker vs. The Oxford Woolen Manufacturing Co.*, 10 Met., 203, it was held, that if an owner of land that is flowed by a mill dam, sells and conveys the land before he has proceeded against the mill owner for damages, he may afterwards maintain an action under the statute, and have a jury to assess the damages caused by the flowing of the land *whilst he owned it*. And in *Charles et al. vs. The Monson & Brimfield Manufacturing Co.*, 17 Pick., 70, it was held, that the former owner of a mill is liable for damages occasioned by flowing land while he was the owner of the mill, although at the time when the complaint was filed he had ceased to be the owner and occupant thereof. But in neither of the above cases did it become necessary to decide the precise question discussed upon this demurrer, namely, whether a grantee of land flowed, could maintain an action for damages sustained by him after he purchased the estate. See *Hathorn vs. Stinson et al.*, 1 Fair-

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Jan. Term, 1860. *field R. (Me.) 224; Preble vs. Reed, 5 Shep., 169.* If, however, the proposition insisted upon by the counsel for the appellant be sound, that the owner of the land at the time it is flowed, can alone recover for past and future damages, and that his grantee takes the property subject to the easement, then it is very evident that such grantee has no right to the profits and use of the land overflowed. Here the respondent alleges, not only that he is the owner in fee, and actually possessed of the land, but further, that he is entitled to the use and profits of the same. By the demurrer it is admitted that this allegation is true, which wholly negatives and rebuts the presumption, that the respondent took the lands overflowed subject to any easement whatever. If it be true that the taking is complete when the land is first overflowed, and that the rights of the then owner to so much land as is overflowed, are thereby divested, then it is very clear, in view of the allegations of the complaint, that the respondent must have been the owner of the land when the dam was erected. But as the question as to whether a subsequent purchaser can maintain an action under the statute for damages sustained by him for keeping up a dam after he became possessed of the land overflowed, even though the dam was erected before he purchased the property, is not fairly raised by this demurrer, it will not be decided, or further noticed.

We are of the opinion that the complaint set forth a good cause of action, and that the demurrer was properly overruled.

The order overruling the demurrer is affirmed.

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DAVIS, vs. THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN, and the MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

A complaint, filed in November, 1858, against a railroad company and its lessee, alleged that the defendants had taken and appropriated for the road-bed

and other uses of said company, certain real estate of the plaintiff (who was a resident of Wisconsin) without his consent, and had failed, for more than six months after such taking and appropriation, to pay to the plaintiff any compensation therefor, or to take any steps to have the amount of compensation due him therefor assessed; and demanded that the damages to said land, caused by the use and occupation thereof by the defendants, should be assessed, and said railroad company be adjudged to make compensation to the plaintiff for such damages, and that in the meantime and until such compensation were made, the defendants should be enjoined from running cars over said land: *Held*, that the complaint did not contemplate a recovery of damages as for a trespass *quare clausum fregit*, but the assessment of a compensation for the land so taken; and a judgment rendered in such action for damages as for a trespass upon the plaintiff's land, was erroneous: *Held also*, that such judgment could not be permitted to stand as a compensation for the land taken, it appearing from the pleadings, that there were divers persons holding mortgages upon said land, who had not been made parties to the suit, but were necessary parties in any proceeding to obtain such compensation: *Held further*, that upon the case presented in the complaint, the plaintiff was entitled, under the statute of 1853, to an injunctive order, restraining the said company and all claiming under it, from running cars or locomotives upon said land of the plaintiff, or using the same in any manner, until such compensation, together with costs, &c., should be paid to the person entitled thereto.

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APPEAL from the Circuit Court of Columbia County.

The complaint of *Davis*, the plaintiff below, which was filed in November, 1858, alleged that he was a resident of the state of Wisconsin: that during the summer and fall of 1856, and the following winter and spring, the *La Crosse and Milwaukee Railroad Company* entered upon certain real estate, of which the plaintiff was seized in fee, of the value of \$5000, being lots 3 and 14 in block 3, in D. H. & T.'s addition to the city of Portage, and eleven acres adjacent (particularly described), and located their railroad through said property, using a strip off of said lots, and a strip of land, one hundred feet wide, through said eleven acres, for the purpose of grading and laying their track, and at the same time, without any certificate in writing of the chief engineer, signed by him and recorded in the office of the register of deeds of the county, taking and occupying the whole of said lots, and portions of said eleven acres, beyond the limits of one hundred feet in width, for the purpose of side tracks, &c., and carrying away therefrom large quantities of earth, rock, &c., whereby they destroyed the value of said lands, and caused the plaintiff damage to the amount of \$5000;

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that said railroad company, and the defendant *Chamberlain*, who has held said road as lessee of the company since September, 1857, still continued to use said land for said railroad track; that said railroad company was insolvent; that when said company first entered upon said land, he hoped they would, in a reasonable time, pay him the damages sustained by him in the premises, and he had frequently since applied to them to do so, but they had always refused to pay the same, notwithstanding they had, for about eighteen months, taken and appropriated said land, by making and laying their track thereon, and taking therefrom earth, &c., and during all that time had been running trains of cars and locomotives over the same, and still continued to do so. The complaint also stated that said railroad company had never, before or after they entered upon said land, offered to pay the plaintiff for the same, nor had they ever made or offered to make any agreement with him as to the value of said land, and compensation therefor, or taken any steps to ascertain the damages of the plaintiff, or the value of said land at the time it was so taken, or at any other time, but had taken the said land for their own use, and the use of the said lessee, without making or offering to make, and as plaintiff believed, without intention to make any compensation therefor; wherefore the plaintiff demanded, that the damages to his said lands, caused by the use and occupation thereof by the said railroad company and the defendant *Chamberlain*, be ascertained or assessed, and that said railroad company might be adjudged to make compensation to the plaintiff, for such damages; and that in the meantime, and until such compensation were made, and the costs and all reasonable charges in this action were paid, the said railroad company and their agents and the said *Chamberlain* and his agents, might be enjoined, and restrained, by an injunctional order of the court, from running cars or locomotives on the said real estate of the plaintiff, and from using said real estate in any manner for the purposes of the said railroad company or their said lessee, and that the plaintiff might have such other relief as his case should require. The complaint was verified.

After service of the complaint, the *Milwaukee and Minne-*

sota Railroad Company became the owner of the La Crosse and Milwaukee railroad and its appurtenances, and was made a defendant to the action, by a supplemental complaint. The answer of the *Milwaukee and Minnesota Railroad Company*, admitted the location of the track of the railroad through the plaintiff's land, but denied any information sufficient to form a belief, whether there was an engineer's certificate on file in the office of the register of deeds of Columbia county, or information sufficient to form a belief, as to the value of the plaintiff's land taken and used by said company, or as to the amount of damage done thereto. The answer further stated, that the land and lots mentioned in the complaint, were mortgaged for nearly or quite the full value thereof, and the title, if any, of the plaintiff, was liable to be wholly cut off by the foreclosure of said mortgages; that said lots three and fourteen were part of forty acres, upon which a mortgage was executed on the 10th of April, 1854, by one *Dunn* to the *L. & M. R. R. Co.*, for \$5000, and recorded the next day, in the office of the register of deeds in said county, which mortgage was assigned by the company, and was then outstanding and unpaid; that there was another mortgage on said lots three and fourteen, (together with lots four and thirteen in the same block), by the plaintiff to said *Dunn*, for \$360, recorded in the proper register's office, on the 24th of June, 1856, and held by one *Clark*, and unpaid, and a mortgage upon the eleven acres described in the complaint, held by one *Barden*, recorded in said register's office, on the 3d day of February, 1858, on which was due about the sum of \$900; wherefore the defendant prayed the court that if it should render any judgment in the action, in favor of the plaintiff, it should be so framed as to protect the interest of all concerned, so that the defendant, upon complying with the terms thereof, would acquire a perfect title to any of said land adjudged to have been taken, and not be liable to be vexed by further suits in regard to the same. The answer was verified.

The plaintiff filed a reply to said answer, stating that he had no information sufficient to form a belief, whether said *Dunn* ever executed a mortgage for \$5,000 upon said forty

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acre tract, but if such a mortgage was made, it was given in exchange for the stock of said company and was void; that he held said lots by a warranty deed from said *Dunn*, and that there was a portion of said tract still owned by said *Dunn*, worth more than sufficient to satisfy the amount of said mortgage; that he admitted the existence of the two other mortgages referred to in the answer, but was willing, as he had at all times been, that so much of the damages caused by the taking of his said lots of land by the defendants, as might be necessary for that purpose, should be applied to their payment.

The cause was tried by the court, without a jury, and before the introduction of any evidence, the defendants, by their counsel, insisted that inasmuch as it appeared by the pleadings, that the premises in question were incumbered by mortgages, the holders of which were not parties to the suit, the court could not proceed to a determination of the action or grant the relief prayed for by the plaintiff, until such incumbrancers were made parties thereto; which objection, as to defect of parties, the court overruled, giving as a reason for overruling the same, "that this was simply an action of trespass, coupled with an application for an injunction under the statute of 1858; that the mortgagees were not necessary parties, and that the incumbrances could in no wise affect the right of the plaintiff to recover, or the amount of his recovery," to which decision the defendant then and there excepted.

The plaintiff then introduced proof of title to the lots and land described in the complaint, and evidence tending to prove the other matters in the complaint alleged.

The defendant then offered to read in evidence the three mortgages mentioned in the answer, and also another mortgage, executed by the plaintiff to one *Walbridge*, on the said eleven acres and certain other property, dated August 7th, 1857, for the sum of \$1,200; to the reading of which mortgages the plaintiff objected, and the court sustained the objection, and the defendant excepted.

The finding of the court as to the damages sustained by the plaintiff, was as follows: "That the value of said elev-

en acres of land, at the time the railroad track was graded and laid through it, was \$300 per acre; that the amount of land actually included within the strip of one hundred feet in width occupied for the purpose of said track, is two and a half acres; that the said land remaining after the laying of the track, was of the value of \$50 per acre; that the actual damage to the said eleven acre tract, by the grading and laying of said track and the use thereof for running trains of cars and locomotives, was \$2,850; that the value of said lots before and at the time of laying said track across the same, was \$1,000; that the value of the same immediately thereafter was \$50; that the whole amount of damage to said lots was \$950."

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As to the other material facts alleged in the complaint, the finding of the court was in favor of the plaintiff, but it does not seem necessary to state it at further length. The court found as conclusions of law, "that the *La Crosse and Milwaukee Railroad Company* was guilty of trespass in grading and laying the said railroad track through the said land and premises of the plaintiff, and running locomotives and trains of cars over the same; that they are liable to a judgment in this action for the amount of the damages above found, together with interest to this date, amounting in all to the sum of \$4,498; that under and by virtue of the statute in such case made and provided, the said La C. & M. R. R. Co, its officers, &c., and said M. & M. R. R. Co., its officers, &c., are liable to be enjoined and restrained from running cars or locomotives over the said real estate of the plaintiff, until such damages, &c., with the plaintiff's costs in this action, are paid to the plaintiff." To each finding of facts and conclusion of law, the defendants excepted. Judgment was entered in accordance with the said finding of facts and conclusions of law.

Enmons, Van Dyke & Hamilton, for appellant:

I. The circuit court was manifestly in error in supposing that this was an action of trespass. If this be an action of trespass, then, notwithstanding the plaintiff has recovered a judgment commensurate in amount with the whole value of the land taken, and the damages to adjacent lands, upon the

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notion, as the whole case shows, that the occupation gained by the trespass was to be continued and perpetual, he may, nevertheless, still maintain ejectment, for there is no rule that a recovery and satisfaction for trespass to the realty, works a change of title, as in trespass or trover for personal property. The allegations of the complaint, the prayer for relief, and the statute upon which the action is professedly based, show that the object and scope of the action is not the recovery of damages as for a technical trespass *quare clausum fregit*, but to establish the measure of *compensation* to which the plaintiff is entitled, by reason of the taking and appropriation of his land to the exclusive and perpetual use of the railroad company; such compensation as, when made to the parties thereto entitled, would vest a title in the corporation. We submit that this action, if at all maintainable, can be so only as one in its nature upon an implied assumpsit, springing from the duty of the corporation to make just compensation for the property which it has taken for public use.

II. The present action cannot be maintained. The charter of the La C. & M. R. R. Co. provides a mode and means of ascertainment of damages in such cases, and the statutory remedy thus given excludes all other remedies. Redfield on Railways, 173, § 19 and notes; *id.*, 157; Pierce on Am. R. R. Law, 168, and note 1; *id.*, 230; 1 Am. Railway Cases, 162, and note 1, p. 166. [Counsel here cited the original charter of the company, and various other statutes, for the purpose of showing that there was an existing statutory remedy open to the plaintiff when he commenced this suit.]

III. There is a fatal defect of parties in this case. The premises, for the taking of which compensation is sought, were, as appears by the pleadings, largely incumbered by mortgages. Evidence of the existence and amount of the mortgages, was offered by the appellants, and rejected by the court below, for the reason that it was "simply an action of trespass." Call the action what you will, it is, in its nature and consequences, a proceeding to condemn the estate to public use, upon satisfaction of the recovery; and because the incumbrancers by mortgage are interested in the question

of condemnation, they are *proper* parties; and because the recovery is to be for the damage to both estates, the legal as well as the equity of redemption, and because the mortgagees would not be otherwise bound, they are *necessary* parties; and the appellants have a right to demand, before they are compelled by the judgment of the court to pay compensation for right of way, that all parties interested in such compensation, or who may be entitled thereto, shall be brought in, that they may become estopped by the record from setting up hereafter the same claim. Upon this point counsel cited, *Hall vs. Nelson*, 14 How. Pr. R., 32; *Denton vs. Nanny*, 8 Barb., (N. Y.) 618; *Kidd vs. Dennison*, 6 Barbour, 9; *Fitchburg R. R. Co., vs. Boston & M. R. R.*, 1 Am. R. Cases, 526-7; *Davidson vs. Boston & M. R. R.*, id., 542; *Scott vs. Nicoll*, 3 Russ., 476.

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Alva Stewart and *I. Holmes*, for respondent, contended, that by the statutes in force, the railroad company was the only party that could procure the appointment of commissioners, or apply for the assessment of damages; that nothing could be done by the person whose land was taken, until the company took the initiative; that the mortgagees were not necessary parties; that the court could determine the controversy between the parties before it, without prejudice to the rights of others; that after the foreclosure, neither the mortgagee nor any other purchaser could maintain an action for the damages sought to be recovered in this case, and if, in the meantime, an easement had been acquired in the land, they would take it subject to such easement, citing Rev. Stat., 1858, p. 715, §§ 18 to 22 inclusive; 15 Conn., 556; 15 John., 205; 14 id., 213; 11 id., 538; 4 id., 42; 5 Iredell Law R., 306; 2 Am. R. Cases, 415; Story's Eq. Pl., § 72.

They also contended that the objection for want of parties was not properly raised; that it is not enough to make a statement of facts in the answer which might show a want of parties, but the answer should distinctly specify the objection; the language of the statute being, that "the objection may be taken by answer;" and finally, that whatever view might be taken of the other questions in the case, the

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proceeding was good, under the act of 1853, for the purpose of an injunction.

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By the Court, COLE, J. If we correctly understand the complaint in this case, it had in view two objects; first, to obtain that legal and constitutional compensation which the respondent might be entitled to receive, by reason of the taking and permanent appropriation of his land by the railroad company; and second, to obtain an injunctive order, under chapter 80, Session Laws of 1858, enjoining and restraining the railroad company, its officers, agents, and all persons claiming under the company, from running cars or locomotives over the land thus appropriated, until this compensation, and all costs are paid. Such appears to us to be the object and purpose of the action. We therefore cannot adopt the view taken of the case by the circuit court, and hold that it is "simply an action of trespass, coupled with an application for an injunction under the statute of 1858." This notion that the suit is instituted to recover damages for trespass *quare clausum fregit*, is decisively refuted by the allegations of the complaint. It alleges in substance that the railroad company, or those claiming under it, have taken possession of the respondent's land, (describing it); have located their railroad through and over it; are now using and occupying it, and running their cars &c., over the same; and states that the land thus taken is of the value of five thousand dollars. In the prayer for judgment, the respondent asks that the damages to his land, caused by the use and occupation of the same by the railroad company, be ascertained and assessed, and that the company may be adjudged to make compensation for such damages. These and other allegations in the pleadings, which might be referred to if necessary, fully and clearly show, that the action is not for a trespass *quare clausum fregit*, but that one of the objects of the suit was to obtain compensation for the property taken by the railroad company. Such being the case, it follows that the judgment recovered in the circuit court, for damages as for a trespass upon the respondent's land, cannot be sustained. Neither do we think that the judgment can be per-

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mitted to stand as a compensation for the value of the land taken. Assuming for the purposes of the case, that the respondent would not be confined to the statutory remedy, given by the charter and the various acts amendatory thereof, but might proceed in this manner to have his land condemned to the use of the company, and obtain compensation therefor, then it is obvious that all parties interested in the land, or who may be entitled thereto, should be brought before the court, so that they will be bound by the judgment and proceedings. In this view, the objection that there was a defect of parties, would seem to be insuperable. We therefore feel compelled to reverse so much of the judgment of the circuit court, as relates to damages for wrongs and injuries to the land and real estate of the respondent. But the complaint shows that the respondent is entitled to an injunctive order, under the statute of 1858, and we therefore affirm so much of the judgment of the circuit court, as enjoins and restrains the company, and all claiming under it, from running cars or locomotives on the land and real estate of the respondent described in his complaint, and taken and appropriated by the company, and from using such land or real estate for the purposes of said railroad company, in any manner whatever, until compensation, together with the costs and reasonable charges of the injunction and the proceedings therein, shall be fully paid over to the persons entitled thereto. It appears from the complaint, that the land and real estate had been permanently appropriated to the use of the company for about eighteen months, at the time the suit was commenced, and the company should either make due and just compensation for the property, or cease to use it altogether.

The judgment of the circuit court is therefore reversed in part, and affirmed in part, in conformity to this opinion, but without costs to either party.

DIXON, C. J., having been of counsel in the case, was absent.

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NOTE. The act of 1858, referred to in the text, was approved May 10th, and its first section was as follows: "In all cases where at the time of the passage of this

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act, any railroad company in this state shall have taken or appropriated, or where any such company shall take and appropriate, for right of way, depot grounds, or for the use of such company in any manner whatever, any lands or real estate owned by any person resident in this state, and for which such person is or may be entitled to compensation from such railroad company, and such company shall have failed, neglected or refused, for six months after having taken and appropriated the same, by making and the laying of its track thereon, to make and pay such compensation to the person entitled thereto, the person so entitled, may, by writ of injunction or order, enjoin and restrain such railroad company, its officers &c., from running cars or locomotives over the land or real estate so taken or appropriated, and from using such land or real estate for the purposes of said company, in any manner whatever, until compensation, together with costs, &c., shall be fully paid over to the person entitled thereto."—*Rep.*

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ROSS vs. THE BOARD OF SUPERVISORS OF OUTAGAMIE CO., impleaded with JOHNSTON and MORROW.

Where a person settled, prior to July 6th, 1853, upon a part of one of the even numbered sections, selected by the governor under the act of Congress of March 2d, 1849, to make up the quantity of land due to the state, under the act of Congress of August 8th, 1846, granting lands for the improvement of the Fox and Wisconsin rivers, and in December, 1854, claimed a right, by virtue of such settlement, to purchase said land of the Fox and Wisconsin Improvement Company, (to which the state had transferred its interest in said grant, with a reservation of the right of pre-emption to settlers thereon,) *proved* his right, and paid said company for such land, and took a certificate of the purchase thereof: *Held*, That he acquired an interest or estate in such land, which was liable to taxation as real estate, in the year 1855, under the laws of this state, although from the failure of the President to approve the selection of such even numbered sections, the legal title thereto did not become vested in the state or its assigns until congress, by act of June 9th, 1858, enacted, that the even numbered sections so selected, and which had been sold by the state or its assigns, should be *confirmed* to said state as *part* of said grant made by the act of August 8th, 1846, and the title of the purchasers should be valid, as though said selection had been made in conformity to law. DIXON, C. J., *dissenting*.

A statement in memorials addressed to congress by the legislature of Wisconsin in 1854 and 1856, that said even numbered sections were *not* liable to taxation, cannot be received to control the judgment of the court, when it is clearly of opinion that the law was otherwise.

APPEAL from the Circuit Court of *Outagamie* County.

This was an action to set aside a tax certificate issued upon a sale of a quarter section of land in the county of *Outagamie*, for the non-payment of taxes assessed for the year 1855, and to restrain *Johnston*, the clerk of the board of su-

pervisors, from executing a deed for said land to the defendant, *Morrow*, who was alleged to be the holder of the tax certificate. The principal question in the case was, whether the land referred to in the complaint was subject to assessment for town, county and state taxes, in the year 1855.

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The facts in the case, as they appear from the finding of the circuit court, are substantially as follows: By an act of congress, approved August 8th, 1846, there was granted to the state of Wisconsin, on its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, &c., "a quantity of land, equal to one half of three sections in width, on each side of the said Fox river and the lakes through which it passes, &c., reserving the *alternate* sections to the United States, to be selected under the direction of the governor of said state, and such selection to be *approved* by the President of the United States. * * *Provided*, the said *alternate* sections reserved to the United States shall [should] not be sold at a less rate than two dollars and fifty cents the acre."

The state of Wisconsin accepted said grant, and the *odd* numbered sections within the territorial limits of the grant, were selected under the direction of the governor, and the selection approved by the President. The United States had, however, sold part of the odd numbered sections so selected by the state, and congress, by an act approved March 2d, 1849, authorized the governor "to select the same quantity of other lands in lieu thereof; subject, however, to the approval of the President." In the month of June, 1849, the governor, in order to make up the deficiency in the quantity of land due to the state under said act of congress, selected, among other tracts, the quarter section of land referred to in the complaint, being part of one of the *even* numbered sections within the territorial limits of said grant, which selection the President of the United States did *not* confirm or approve.

By an act, approved July 6th, 1853, the legislature of Wisconsin incorporated a company, under the name of the "Fox and Wisconsin Improvement Company," to complete the improvement of said rivers, the fourth section of which

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act declares, that the lands granted by congress in aid of said improvement, and remaining unsold, should be, and were thereby, granted to the Fox and Wisconsin Improvement Company, upon certain terms and conditions; that all the lands so granted to said company should be exempt from taxation of every description, under any law of this state, until after the same should have been sold and conveyed, or contracted to be sold, or leased, or improved, by said company; *Provided*, said exemption should not continue longer than ten years; that any person who might have acquired the right of pre-emption under the laws of this state, or of the United States, to any portion of said lands, or had settled thereon in his own right, prior to the passage of that act, should be entitled to purchase the same of said company, at the minimum price of one dollar and twenty-five cents per acre; and that it should be the duty of the governor to take every necessary means to obtain, at as early a day as possible, the lands theretofore selected, and such as might thereafter be located by the company for the balance of the grant in aid of said improvement.

On the 25th of December, 1854, the plaintiff claimed the right to purchase the land referred to in the complaint, of the Fox and Wisconsin Improvement Company, at the price of one dollar and a quarter per acre, by virtue of a settlement made thereon by him, in his own right, prior to the 6th day of July, 1853, and on the said 25th of December, 1854, *proved up* his right to purchase said land at that price, before the proper officers of said company, paid the purchase money, being two hundred dollars, and received from the proper officer of the company a receipt therefor, stating that it was "in full" for said land.

On the 1st of March, 1854, the legislature of the state of Wisconsin adopted a memorial to Congress, in which it was represented, that the even numbered sections of land on the Fox river, in the state of Wisconsin, and within three miles of said river, were reserved from sale in the year 1848, for the purpose of being donated to the state of Wisconsin, for the improvement of the Fox and Wisconsin rivers; and that with such expectation settlers went on to said lands,

and made large and valuable improvements; that such improvements or lands were not subject to taxation for any purpose whatever; and that such settlers were very desirous of obtaining titles to said lands; wherefore the memorialists prayed, that said lands should be brought into market, either by the general government, or by donation to the state of Wisconsin, to be disposed of as the state should see fit; and that all of said settlers on said lands might have the right of pre-emption, who should reside on said lands, or have improvements on the same to the amount of fifty dollars, at the time of the passage of a law (by congress) on said subject.

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On the 10th of October, 1856, the legislature adopted another memorial to congress, in which, after making the same statement contained in the former memorial, as to settlements and improvements upon said even numbered sections of land, and that such improvements or lands were not subject to taxation for any purpose whatever, it was further represented, that, at the time such settlements were made, it was generally believed that the selection of such even sections would be confirmed to this state, and the settlers therefore entered upon them in undoubted good faith, as pre-emptors under the laws of this state; that the said settlers were subjected to great inconvenience, and in many cases to serious loss, in consequence of the want of title to their homes, and looked to congress as the only power to grant them relief; that the *even* sections had always been treated by the general government as a part of the grant made for the improvement of the Fox and Wisconsin rivers; and that, although the selection of such *even* sections had never been confirmed, the state had never yet been permitted to select other lands in lieu of them; wherefore the memorialists prayed congress to pass a law confirming the said selection of said even numbered sections, made by the state under the said grant, upon condition that said lands should be secured to the settlers thereon at a price not exceeding ten shillings per acre.

On the 9th of June, 1858, congress passed an act, entitled "an act for the relief of certain settlers on the public lands in the state of Wisconsin," by which it was enacted, "that

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so much of the even numbered sections of land, selected by the state of Wisconsin in the month of June, in the year eighteen hundred and forty-nine, to satisfy the quantity of land due said state under the act of congress of August 8th, eighteen hundred and forty six, granting land in aid of the improvement of the Fox and Wisconsin rivers, as *have* been sold or contracted to be sold by said state, or its assigns, under the laws thereof, *are* hereby confirmed to said state as parts of said grant, and the title of the purchasers declared to be valid, as though the said selections had been made in conformity with law; * * * *Provided*, that a schedule duly certified by the governor, of the lands sold and contracted to be sold, prior to the passage of this act, shall be filed in the general land office, within six months from the date of this act."

Within six months from the date of said act of congress, the schedule required by said proviso was filed in the general land office, containing the tract of land in the complaint described, and on the 26th of January, 1859, the plaintiff received a conveyance of said land from the Fox and Wisconsin Improvement Company, in compliance with the receipt or certificate of purchase thereof, above mentioned. It was also found by the circuit court, that the United States had never disposed of said tract, except by the several acts of congress above mentioned, and the proceedings had thereunder.

The court found, as conclusions of law, that the title to the land in the complaint mentioned, was in the United States at the time it was assessed for taxes in 1855; that the assessment and sale for taxes were illegal and void; that the issuing of the tax deed would create a cloud on the plaintiff's title; and that the plaintiff was entitled to a perpetual injunction against the execution of such tax deed. To these conclusions of law the defendants excepted, and judgment being rendered in accordance therewith, the board of supervisors of the county of Outagamie appealed.

George H. Myers, for appellant, contended, that the plaintiff had an estate in the land, which was taxable at the time the tax was levied. Our statutes declare all property, real

and personal, not expressly exempt from taxation, to be taxable. If a citizen owns an estate in land, of which the fee is in the government, that estate is taxable. Thus, lands are taxable as soon as entered, and the title conveyed by the patent relates back to the time of the entry. 15 Ohio, 367; 8 McLean, 107; 7 Ohio, 156. The article in our constitution, which provides that no tax shall be levied upon land, the property of the United States, is only the assent of this state to be bound by a law of congress, and if the United States has consented to the taxation of this land by the state, the tax is legal. Congress, by the act of June, 1858, confirmed the land to the state as part of the grant of 1846, and declared the title of the settlers to be valid, as though the selections of 1849, had been made in conformity to law, and the president, in approving the act of 1858, has approved the selections of 1849, within the spirit and meaning of the act of 1846. By the act of 1858, congress consented to the construction placed by the governor of Wisconsin upon the act of 1846, and consented to the disposition the state had made of the land.

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The act of 1846 contained words of grant; the act of 1858 only words of *confirmation*, and the lands are confirmed to the state *as part of the grant made by the act of 1846*.

The Fox and Wisconsin Improvement Company, by selling the land to the plaintiff, estopped itself from denying that it owned the land, and by its charter the land became taxable the moment the contract of sale was made. The plaintiff took the land subject to that estoppel. *McLary vs. Ramson*, 19 Ala., 430; *Coakley vs. Perry*, 3 Ohio St. Rep., 344; *Phelps vs. Blount*, 2 Dev., N. C., 177. The plaintiff, by claiming the land of the company, proving up his right thereto, paying for it and accepting a duplicate, is estopped from denying that the company had title, especially since he has procured a conveyance of the land from the company by virtue of that purchase, and now holds it under the title so acquired. *Fitch vs. Baldwin*, 17 John., 161; *Jackson vs. Ayers*, 14 id., 223; *Bond vs. Swearingen*, 1 Ham., 182; *Thomas vs. Marshall*, Hardin, 19; *Sayles vs. Smith*, 11 Wend., 57; *Riley vs. Million*, 4 J. J. Marsh., 395; *Harle vs. McCoy*, 7

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id., 318; *Chiles vs. Jones*, 4 Dana, 479; *Miller vs. Shackelford*, id., 264; *Bliss vs. Smith*, 1 Ala., 273; *Ogden vs. Walker's Heirs*, 6 Dana, 420; *Love vs. Elmonston*, 1 Ire. Law R., 152; *Bullen vs. Mills*, 29 Eng. C. L. Rep., 16.

If the lands are not taxable, the deed would be utterly void, and an injunction is unnecessary. 4 Barb. (N. Y.) Rep., 16; 6 John. Ch., 27; 4 id., 352. The memorials of 1854 and 1856 do not estop the state from claiming that the lands were taxable. They were not acts of legislation, nor were they binding on the state. The government is never estopped. *Owen vs. Bartholomew*, 9 Pick., 520.

James H. Howe and Norris, for respondent:

I. The state possesses the sole power to declare what is and what is not taxable. In the two memorials offered in evidence, the legislature declared that the land referred to in the complaint was not liable to taxation.

II. The title to the land was in the United States, at the time of the taxation and sale by the county. This court, in the case of *Veeder vs. Guppy*, 3 Wis., 520, decided that by the act of congress of 1846, the state became seized of one half of the land within three miles of Fox river, and that the United States retained title to the residuc. The land in question, being part of that residuc, was therefore not granted to the state by the act of 1846. It is not pretended that congress has passed any other act in any manner affecting the title, excepting the act of June 8th, 1858, nor is it pretended that the title has ever been conveyed by patent. It follows that the title must have remained in the government of the United States until that act was passed. The counsel for the appellant seeks to escape this conclusion, by contending that the act of 1858 is a mere "confirmation of a pre-existing title," and therefore has relation back to a time prior to the imposition of the taxes referred to. To make the act of 1858 operate as a confirmation of a title, there must have been some pre-existing title on which it could operate. A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unvoidable, or whereby a particular estate is increased. 2 Black. Com., 325. But the Fox and Wisconsin Improvement Company

could not give any title to the respondent which they did not themselves possess. They derived all their title from the state, and we have already seen that the state took no title to the land in question by the act of 1846. Besides, the state never made any claim to the title, but on the contrary, by the memorials of 1854 and 1856, expressly disclaimed any title to the land and any right to tax it. The respondent, therefore, had no title upon which a confirmation could operate.

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III. The general doctrine governing estoppels *in pais* is, that a party is usually concluded by admissions or conduct upon which others have been induced to act, when, if he were permitted to prove that such admissions or conduct were false, such permission would operate as an injury to the persons who were influenced by them. *Welland Canal Co. vs. Hathaway*, 8 Wend., 483; 1 Phillips on Ev., C. and H.'s notes, 460, and cases there cited. But the estoppel prevails only in favor of the person who has been drawn in by the false act or representation, and he must show affirmatively that his own conduct was controlled or influenced by such false representation or act. *Copeland vs. Copeland*, 28 Maine, 525; Phillips on Ev., *supra*.

There is no proof showing any claim of *title* by the respondent, or a single act or representation of his by which the authorities of the county of Outagamie could have been misled. The company did not claim to have a title at the time of the contract with the respondent, but only gave him, at most, an agreement to convey the land to him at a future time.

To the point that the state took no interest, under the act of 1846, in any particular tract of land, until after its selection and approval, respondents' counsel cited *Lessieur et al. vs. Price*, 12 How. (U. S.) 59; *Rutherford vs. Green's heirs*, 2 Wheat., 196; *Landes vs. Brant*, 10 How., 374; *Stoddard vs. Chambers*, 2 How., 284; *Bissell vs. Penrose*, 8 How., 317.

To the point that improvements made upon the land of another with his assent, express or implied, are personal property and liable to levy and sale as such, they cited *Wells vs. Banister*, 4 Mass., 514; *Ashman vs. Williams*, 8 Pick.,

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402; *Rogers vs. Woodbury*, 15 Pick., 156; *Curtiss vs. Hoyt*, 19 Conn., 154; *Marcy vs. Darling*, 8 Pick., 283; *Doty vs. Gorham*, 5 Pick., 487; *Aldrich vs. Parsons*, 6 N. H., 555; *Lyddall vs. Weston*, 2 Atk., 19; § 5, chap. 15, Rev. Stat. of 1849.

By the Court, COLE, J. The leading question which we have to consider in this case is, had the respondent, at the time the land mentioned in the pleadings was taxed, an interest or estate therein, which was liable to taxation by the laws of this state? This is understood to be a question of considerable public interest, on account of its bearing upon the legality of a large amount of taxes which have been levied upon lands similarly situated, in counties lying along the line of the Fox and Wisconsin improvement.

The tract is a part of one of the even sections, within the limits of the grant made by congress to the state, by the act of August 8th, 1846. It is well known that the governor, upon the acceptance of the grant by the state, and in its behalf, selected, under the provisions of the act, the unsold lands in the odd numbered sections within the limits of the grant, as those which the state would take under the act aforesaid, and that this selection was approved by the general government. In June, 1849, the governor also, under the act approved March 2d, 1849, (9 U. S. S. at large, p. 352,) which authorized him to select the same quantity of other lands, in lieu of the odd numbered sections which had been sold by the United States subsequent to the act of 1846, selected, among other lands, the tract mentioned in the complaint in this case. The next legislation by congress upon the subject, was the passage of the law of June 9th, 1858, (11 U. S. S. at large, p. 313,) the first section of which declared, "that so much of the even numbered sections of land selected by the state of Wisconsin in the month of June, in the year eighteen hundred and forty-nine, to satisfy the quantity of land due said state under the act of congress of August, eighteen hundred and forty-six, granting land in aid of the improvement of the Fox and Wisconsin rivers, as have been sold or contracted to be sold, by said state or its assigns, under the laws thereof, are hereby confirmed to said state as

parts of said grant, and the title of the purchasers declared to be valid, as though the said selections had been made in conformity with law; provided," &c.

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On the 25th of December, 1854, the respondent applied to the Fox and Wisconsin River Improvement Company, to which the state had assigned its interest in the grant, to purchase the tract at \$1.25 per acre, by virtue of a settlement in his own right, made on said land in the year 1849, proved up his right to the same according to the provisions of the charter of the company, and to the satisfaction of the officers thereof, paid the company two hundred dollars, and took a duplicate receipt, and after the passage of the act of June, 1858, received a deed of the land from the company. The land was assessed for taxes for 1855, and was forfeited, and the complaint was filed to set aside the tax certificates given upon the sale, as constituting a cloud upon the title, and to restrain the officer from giving a tax deed, &c. The ground upon which the respondent relies to sustain his complaint is, that the land was not rightfully subject to taxation in 1855, nor until after the passage of the act of 1858, since, up to that time, the title to the same was in the United States. We think this position unsound, and that it cannot be successfully maintained. Sections 1 and 2 of chap. 15, R. S., read: "All property, real and personal, within this state, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law.

"Real property shall, for the purposes of taxation, be construed to include the land itself, and all buildings, fixtures and other improvements thereon, and all mines, minerals, quarries and fossils in and under the same; and the terms 'land' and 'real estate,' when used in this chapter, shall be construed as having the same meaning as the term 'real property.' "

Had the respondent such an interest or estate in the land in 1855, as to be subject to taxation within the intent and meaning of these provisions of law? That he himself believed that he had, at that time, some valuable beneficial interest in the land, his conduct in reference to the same most conclusively shows. Else why did he prove his settlement

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upon this land in 1849, and claim the right to purchase the same of the company at \$1.25 per acre? Why did he give the improvement company two hundred dollars, and take a receipt which read that this sum was in "full for the north-east quarter of section No. 30, township 21 north, of range No. 17 east, containing 160 acres — hundredths, at the rate of \$1.25 per acre, subject to any valid right of pre-emption?" Does this not show that he then supposed he was bargaining for some valuable interest in that property? Does it not show that he in fact purchased all the interest of the company in the same, whatever that interest was, legal or equitable, inchoate or perfect? There is but one answer to be given to these interrogatories. The respondent unquestionably then supposed that he was securing, or had secured, some valuable right or interest in the quarter section. Was he mistaken in this idea? We think not. Undoubtedly he then had but an inchoate and imperfect title. The perfect legal title, the fee, had not passed out of the United States. But that he had a valuable present right and interest in the land, an interest that the laws of the state recognized and protected, an interest that congress subsequently confirmed and made absolute, by declaring the respondents' title thereto "to be valid as though the said selections had been made in conformity to law," cannot be denied. Was this interest or estate subject to taxation? In other words, was it "real property," "land," "real estate," within the meaning of sections one and two of chapter 15? If so, the legislature has declared it subject to taxation, unless expressly exempted therefrom.

Section 9 of the chapter which prescribes the rules to be observed in the construction of statutes, unless such construction would be inconsistent with the manifest intent of the legislature, reads as follows: "The words 'land' or 'lands,' and the words 'real estate' and 'real property,' shall be construed to include lands, tenements and hereditaments, and all rights thereto and interest therein." Chap. 4, R. S., 1850. The words "real property," "land," "real estate," as used in sections one and two of chapter 15, it is clear, were intended to have the same sense and meaning as it is declared in sec. 9, chap 4, these words shall be construed and deemed to have.

That the respondent had a right to this tract of land assessed for taxes, and an interest therein, is, we think, most demonstrably clear and certain.

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The circuit court held, because the legal title to the land was in the United States at and before the assessment and laying of the tax, that therefore the state could not rightfully impose any tax upon it. We have assumed all along that the fee did not pass out of the United States until the passage of the act of June, 1858, and such we think was the case. But it by no means follows that the state did not acquire a right to and an interest in this land, when the governor selected it under and by virtue of the act of March 2d, 1849. The governor was authorized by that act to select the same quantity of other lands to make up for the deficiency in the amount due the state by the act of 1846. He selected this tract. His selections were, however, subject to the approval of the President. For some reason, the President did not approve of his selections. If he had, the grant would have become operative, and the title in fee would have vested in the state. In 1858 congress did away with the necessity for this approval of the President, by confirming the title to these selections, in the state, or in the purchasers from the state.

But it was insisted by the counsel for the respondent, that the state, or the improvement company, or its assigns, acquired no right or title whatever to the lands selected by the governor, until the passage of the act of 1858; and that the right and title to these lands remained perfect in the general government up to that time. This, however, we deem an erroneous view of the effect of the legislation of congress upon this subject, and an entire misapprehension of the intent and object of the act of 1858. For clearly, that act goes upon the assumption, that some right or interest in such lands had been acquired by the state, and sold, or contracted to be sold, by said state or its assigns, and then proceeds to confirm that right, and declare the title of the purchasers valid. The title thus confirmed related back to the selections of 1849. It appears to us that this is the true and correct construction of the act of 1858.

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But again, is it true that the state cannot impose a tax upon any land while the fee to the same is in the United States? It is conceded that so long as the land remains a part of the public domain of the general government, it is not subject to taxation. For if the state would otherwise have had the right to impose a tax upon land, the property of the United States, this right is expressly relinquished by sec. 2, art. 2, of the constitution. But how is it with respect to lands purchased by an individual of the general government? Are they not subject to taxation in this state until the patent issues? As a general rule, as soon as the public land is purchased and paid for, it becomes the property of the purchaser, and is sold and conveyed before it is patented. The receiver's receipt, or certificate of purchase, is made evidence of title by statute. Now, if the land is not liable to be taxed until the fee passes out of the general government, and becomes vested in the purchaser, the owner only needs to neglect or avoid calling for the patent, and he may thus, through all time, avoid the payment of taxes. In the absence of all authority upon the question, I should be slow in adopting such a conclusion, but the following cases show that this is not the law: *Carroll vs. Safford*, 3 How. U. S., 441; *Astrom vs. Hammond*, 3 McLean, 107; *Carroll vs. Perry*, 4 id., 25; *Gwynne vs. Niswanger*, 15 Ohio R., 367.

But it was further insisted that the legislature, by the memorial to congress, approved March 1st, 1854, expressly declared that the land was not subject to taxation, and it is contended that this declaration is conclusive upon the question. Had the legislature attempted to give a construction to chapter 15, R. S., 1850, and to determine what property by that law was subject to taxation, such construction might have been entitled to some consideration; but this it did not do. The attention of the members of the legislature was probably not generally called to the language of that memorial, and when we consider the manner in which such things are passed, it is not too much to say, that they are not entitled to any weight with a court upon a question of this nature. Certainly the expression in that memorial, that the lands therein referred to "are not subject to taxation for any

purpose whatever," cannot be binding upon our judgment, when we are clearly of the opinion that the law is otherwise.

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These observations, it is believed, sufficiently dispose of all questions necessary to be noticed.

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The judgment of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with this decision.

DIXON, C. J. The majority of the court concede that the legal title to the land in question, was, at the time of the supposed levy and assessment of the tax, in the government of the United States, but they say that it was affected by an interest or trust in favor of the respondent, which made it taxable. How that interest or trust arose, or what was its exact nature or extent, is not very clearly and accurately explained. It is also conceded, as I understand the opinion, that if the title was at that time unaffected by any such interest or trust, then the land could not have been taxed. This, in my judgment, was its precise condition, and, therefore, I think the levy and assessment were void.

It is not claimed that any title or interest in the even numbered sections passed to the state by virtue of the act of August 8th, 1846, and of the selection made by the governor under its provisions. By the express language of the grant, the alternate sections were reserved to the United States, and after the governor had selected the odd-numbered sections, the title to the even-numbered ones, of which the land in question was a part, became, so far as that act was concerned, unalterably fixed in them. There can, therefore, be no doubt that the United States remained the absolute and unqualified owner down to the passage of the act of March 2d, 1849. That act assumed not only this absolute and unqualified ownership, but also the right of the United States to confirm entries of the odd-numbered sections, made subsequent to the passage of the act above referred to. It reads: "That all land entries made in the Green Bay land district, in the State of Wisconsin, upon the odd-numbered sections of the Fox and Wisconsin River reservation, in said

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state, subsequent to the passage of an act entitled 'An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, and connect the same by canal, in the Territory of Wisconsin,' approved on the eighth day of August, eighteen hundred and forty-six, be, and the same are hereby declared to be good and valid as though said act had not been passed: Provided, nevertheless, that the governor of said state is hereby authorized to select the same quantity of other lands in lieu thereof; subject, however, to the approval of the President of the United States."

The object of its enactment was twofold—to establish the titles of settlers, who had made entries of the odd-numbered sections, and to provide a method for supplying the deficiency thus occasioned, by selections to be made elsewhere. The power of the governor, under the previous act, having been already exhausted by a choice of alternate sections, according to its terms, it was considered, and no doubt correctly, that without this further authority, he could not select elsewhere, and thus the grant would remain in part unexecuted. This authority was, however, expressly made subject to the approval of the President. The act of approval was voluntary. The President could give or withhold his assent at his pleasure; and if he refused, there was no power to compel him. The grant itself being in the nature of a mere gratuity or gift, and the United States the granting power, it is clear that congress could impose such conditions and restrictions as to its effect, and the manner of its execution, as it saw fit. One of those conditions was, that the President should approve the selections to be made by the governor. Both selection and approval were made necessary to give the state a vested interest in any specific tract of land. Without either, the grant was, as yet, unexecuted; and there would, in my opinion, be as much propriety in saying that a specific interest in the land in question passed to the state, and through the state to the improvement company, without selection, as without approval.

The question here presented differs from that decided by this court, under the original act, in the case of *Veeder vs.*

Guppy, 3 Wis., 502. Under that act, the interest of the state was fixed and certain. The quantity of land to which the state was entitled, as compared with the entire tract from which selection was to be made, was clearly ascertained. It was each alternate section, or one-half the entire tract. Its location and boundaries were accurately defined. It was three sections in width on each side of the Fox river, and the lakes through which it passes, from its mouth to the point where the canal should enter the same, and on each side of the canal from one river to the other. Under the act we are now considering, these things were not so. The interest of the state was indefinite and uncertain. The amount of land to which it was entitled, as compared with that from which it was to be chosen, was entirely undefined, and depended for ascertainment upon the investigation of a question of fact, namely, the number of acres of the odd-numbered sections which had been entered at the land office. Its location was not fixed. It might have been selected near the point of junction with the canal, or midway along the river, or near its mouth, according to the extent of the deficiency and various other influencing circumstances. The rights of the state not being ascertained by the law, the selection by the governor and approval by the President, were not mere acts of partition, but of conveyance, and were indispensable to the transfer to the state of any specific title. There were, therefore, very material reasons for reserving this power of approval to the President, and why the title should not pass until his assent, or that of congress, should be given.

The grant which had, upon partition, resulted in a transfer to the state of the odd-numbered sections, was, by reason of the entries of a portion of them, partially defeated; and the combined operation of the two acts was to give the governor, subject to the approval of the President, the right to select from the even-numbered sections still belonging to the United States, a sufficient quantity of land to make up the deficit. This was not a right to any particular parcels or sections, but a right generally to have that quantity of land out of the even-numbered sections within the reserva-

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tion, to be selected with the assent of the President. It was a right which rested in compact, merely, and depended for its execution upon the political authorities of both governments. Until that was done, there was nothing of which the courts or taxing officers of the state could take cognizance as the specific subject of the grant. It could not be marked out or defined. Prior to such execution, the government of the United States was at liberty to make such disposition of the lands as it pleased; and if, instead of confirming the tract in question to the state and its assigns, it had, on the 9th of June, 1858, transferred it to another; or if, up to the present time, it had entirely refused to dispose of it, can there be any doubt that the tax must have been held void? I will almost hazard the assertion, that if the case had been like either of these, even my brethren would have had some doubts as to its legality. Is the case now presented, in reality different? If the title were still in the United States, as it was in 1855, when the tax was assessed, would it change the legal aspects of the case, could the court know that three years hence it would be transferred to the state and those claiming under it? It seems clear to me that it would not, and that such considerations should have no influence upon the question. And yet such is the effect which has been given to the act of congress passed three years after the tax was levied. Upon the same principle, it is difficult to perceive why all the lands of the United States, within the reservation, were not taxable, on the supposition that they might some time become the property of the state or its assigns. This, I insist, is a gross and palpable error, which has its origin in overlooking the fact that, for all practical purposes, the United States were still invested with the complete and absolute title and dominion of all the lands, subject, it is true, to the compact, which, though it bound the public faith, was practically inoperative, because, until executed by the political authorities, it had no object to which it could attach. The claim of the state was like those general reservations sometimes found in cessions of land by the Indian tribes; or the rights of the states to the sixteenth sections for the use of schools; which, until

location or survey, are ineffectual to convey any specific interest. See *Gaines vs. Nicholson*, 9 How. (U.S.), 356; and *Cooper vs. Roberts*, 18 id., 173.

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The selections of the governor under the act of 1849, were, as we are informed, made in that year. They were never approved by the President. From that time until 1858, running through a period of two entire administrations, and a portion of a third, the President steadily refused to sanction them. On the 9th of June, 1858, congress, in part, adjusted the matter, not by ratifying the selections, but by declaring the title of the purchasers "to be as valid as though the said selections had been made in conformity to law: *Provided*, That nothing contained in this act shall be construed to increase the quantity of land to which the state is entitled under the grant aforesaid: *And provided further*, That a schedule, duly certified by the governor, of the lands sold, or contracted to be sold, prior to the passage of this act, shall be filed in the General Land Office within six months from the date of this act." The act is entitled "An act for the relief of certain settlers on the public lands in the state of Wisconsin."

Nothing can be plainer from the face of this act, the residue of which is quoted in the opinion of the court, than that the object of congress was not to aid the selections of the governor, which are asserted not to have been made "in conformity with law," but to help the unfortunate settlers, who had entered upon the lands, made improvements, and paid the price to the state or the improvement company, under the mistaken belief that they were the owners, to a title which it was otherwise certain they could not obtain. It was an act of grace or favor to such supposed purchasers, of whom the respondent was one, and was not intended as a recognition of any previous rights or interests in the state or the improvement company. The existence of such rights or interests is expressly ignored; and it seems idle to emphasize the word "confirmed," when the very next lines, in the connection, negative the impression sought to be established by it, and show that whatever technical effect may be

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given to it when used in merely private conveyances, none such was here intended.

The selection by the governor was but one step towards the execution of the compact, and availed nothing unless it was met by the approval of the President. Clearly it was worthless as an evidence of title, after the President had refused, which must be presumed after a silence of six years, from 1849 to 1855. There was, therefore, at that time, not the slightest foundation for any right or title to this particular tract of land, either in the state, the improvement company, or the respondent. The United States were at liberty to grant it to others, or retain the title at their pleasure. There were no considerations of public faith to prevent them from doing either. The President, by his refusal to approve, had absolved them from all such obligations, and, in effect, requested the governor to select elsewhere, as he might have done. How, then, this undefined interest or equity, which the majority of the court seem to suppose was at that time vested in the respondent, arose, is more than I can see. It certainly did not exist with the consent of the United States, who alone could create it. It was the interest of every mere trespasser upon the public domain—neither more nor less—and if that makes the lands of the United States taxable, the decision of the majority is correct; otherwise, in my judgment, it is not.

It is stated as evidence of title in the respondent, that he believed the improvement company were the owners, and applied to them to purchase, paid the price, and received a duplicate for the land. To this position the opinion furnishes its own answer. We sit here to decide the law as we find it, and not as the parties or others may have supposed it to be. If the erroneous recitals of the legislature in a memorial to congress cannot conclude us, surely the mistaken belief of a private individual ought not to do so. The respondent acquired no interest, until congress saw fit to give it to him, and his belief did not affect the question.

It is also said that the act or confirmation of congress in

1858, related back to the selections of 1849. This is not sustained by a fair construction of its language. As has been already observed, congress did not attempt to ratify the selections, but to validate the title of the purchasers of such lands as had then been sold, or contracted to be sold, by the state or its assigns, not exceeding the quantity to which the state was entitled under the grant. If there were any lands selected, but not sold or contracted to be sold, as to them no title passed. The selections were considered as not in conformity with law, and congress seem studiously to have avoided their confirmation. The President had refused to approve them, and it was as if they had never been made. They were mentioned, it is true, but only as descriptive of the lands conveyed, the title to which was transferred directly to the purchasers. There was nothing, therefore, to which the title of the purchasers could relate, and the act only purports to declare it to be valid at that time. It was, in all respects, a fresh grant, and in no way retrospective in its operation.

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But further than this, I am satisfied that the doctrine of relation cannot be applied to a case like the present. A tax, to be valid, must be so at the time it is laid and the land sold. The whole proceeding has relation to that time, and the right to tax must then exist. If the land be not then taxable, subsequent events cannot make it so, or cure the imperfection. The supreme court, speaking of the effect of a conveyance of land for taxes, in the case of *Carroll vs. Safford*, 3 How., 462, cited by the court, say: "It cannot, however, convey a better title to the land sold for taxes, than the owner of such land, to whom it stands charged, possessed at the time the taxes constituted a lien, or when the land was sold." There was no power of taxation, and the respondent had no title when this land was sold. The deed, therefore, can only operate as a cloud upon the title which he has since acquired.

Again, it is said that because lands may be rightfully taxed after entry and before the emanation of the patent, the taxation in this case was proper. Enough has already been said to show that there is no analogy between the cases.

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Where land has been entered, the courts hold, in the cases cited, that it is no longer the property of the United States, but of the purchaser. They say that he has purchased and paid for it, and holds a final certificate, which can no more be cancelled by the United States than a patent; and that in this respect there is no difference between a certificate holder and a patentee. The question therefore is not whether the government may not, technically speaking, have been possessed of the fee, but who was the substantial owner.

I have endeavored to show that the United States had a perfect title to the tract in question, and if I have succeeded, those authorities are inapplicable.

For these reasons, I am of opinion that the judgment of the circuit court should be affirmed.

Judgment reversed.

MCKAY VS. THE BOARD OF SUPERVISORS OF THE COUNTY OF OUTAGAMIE, and others.

This case is similar in principle to that of *Ross vs. The Board of Supervisors, &c.*, ante, p. 26, and is decided in the same manner.

APPEAL from the Circuit Court of Outagamie County.

The complaint was the same as in the case of *Ross vs. The Board of Supervisors of Outagamie County*, ante, p. 26, and a demurrer to the complaint was overruled, from which decision the appeal was taken.

June 4. *By the Court*, COLE, J. In the case of *Ross vs. The Board of Supervisors of Outagamie County*, just decided, we held that a person purchasing a part of one of the even sections in the Fox and Wisconsin Improvement grant, acquired a right or interest therein, which was subject to taxation under the laws of this state, even before the passage of the act of congress of June 8th, 1858. We suppose that decision, in effect, disposes of this case.

The order overruling the demurrer to the complaint filed herein, must be reversed, and the case remanded for further proceedings.

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DIXON, C. J., dissented, for the reasons assigned in his dissenting opinion in the case of *Ross vs. The Supervisors of Outagamie County*, ante, p. 26.

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By sections 4 and 5 of Article XI of the constitution of this state, there is a substantial reservation to the people themselves of all legislative power upon the subject of banks and banking.

The clause in the constitution which requires that "the rule of taxation shall be uniform," is a limitation upon the legislature in the exercise of its general power to levy taxes, and not a restriction upon the people in the exercise of the power thus reserved.

That portion of the banking law of this state which regulates the taxation of the capital stock of banks, is therefore not in violation of that clause in the constitution.

APPLICATION for a Mandamus.

The case will appear sufficiently from the opinion of the court.

Geo. B. Smith, for relator.

S. U. Pinney, for respondent.

By the Court, DIXON, C. J. This is an application for a mandamus to compel the respondent, who is treasurer of the state, to deliver to the relator, a corporation organized under the provisions of the law authorizing the business of banking, certain interest coupons attached to the state bonds deposited by the relator with the respondent as security for the redemption of its circulating notes. The proceeding is amicable in its nature, and designed to test the validity of that portion of the law which regulates the taxation of the capital stock of banks, and which is supposed to have been rendered doubtful by the decisions of this court in the cases of *Knowl-*

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ton vs. The Supervisors of Rock Co., 9 Wis., 410, and *The Attorney General vs. The Winnebago Lake & Fox River Plank-road Co.*, 11 Wis., 35. Those cases determine that the rule of uniformity prescribed by the constitution, requires that all property taxed for the purposes of revenue, whether general or local, shall be taxed equally, according to its just and true value; and that no one species of property, from which such taxes may be collected, shall be taxed higher than any other species of equal value.

The application sets forth, that the bank is the owner of thirty-four bonds issued by the state of Tennessee, and two issued by the state of Missouri, each for the sum of \$1,000, drawing interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, which it transferred to the respondent in trust, to secure the redemption of its circulating notes; that the semi-annual instalments of interest are secured by coupons attached to each bond; that on the first day of January, 1860, there became due upon each bond the sum of thirty dollars in interest, amounting in all to ten hundred and eighty dollars, which can only be collected on presentation of the proper coupons; that on the 15th day of February following, the bank comptroller made and delivered to the bank his order in writing, directed to the respondent, requiring him to deliver the coupons to the bank; and that on the same day the order was presented to the respondent, who peremptorily refused to deliver the same, or either of them.

The respondent, in his return, admits these allegations, but seeks to avoid them by averring that the capital stock of the bank is \$50,000, upon which there became due and payable to him, as state treasurer, on the first day of January, a semi-annual tax of three-fourths of one per centum, amounting to \$375, which still remains unpaid; and that he has a lien upon the coupons for the amount of the tax, together with the additional sum of \$500, which has been forfeited by reason of its non-payment.

To this the bank demurs, upon the ground that the statute (sec. 20, chap. 71, R.S.) is unconstitutional and void, within the principles established by the decisions above re-

ferred to. It reads as follows: "Every bank and banking association, organized under the provisions of this chapter, shall pay to the state treasurer, on the first day of January and July of each year, a semi-annual tax of three-fourths of one per centum on the amount of capital stock of such bank or banking association; the first payment of such tax to be computed at the rate of one and a half per centum per annum from the time of filing the certificate required in section two, to the first day of January or July then next succeeding. If any bank or banking association, as aforesaid, shall neglect or refuse to pay said tax for ten days after it shall become due, notice of non-payment shall be sent to such delinquent, by the state treasurer, and if the payment be not made within twenty days thereafter, such delinquent bank or banking association, shall, in addition to the tax aforesaid, forfeit and pay to the said treasurer, for the use of the state, one per centum on the amount of its capital stock. The above semi-annual tax and forfeiture shall always constitute a lien on the interest of the securities deposited with the treasurer, as provided in section twenty-two; and in case of non-payment of such tax and forfeiture, or either of them, the treasurer is authorized and required to revoke the power of attorney granted such delinquent, as provided in section thirty-one, to collect the interest of such securities, and apply the same to the payment of said tax and forfeiture, or either of them, and hold the balance, if any, subject to the order of such delinquent. If the interest of said securities shall be insufficient to pay said tax and forfeiture, the treasurer, after deducting the amount of said interest, may collect the balance in any court of competent jurisdiction in the county where such delinquent is located, in the name and on behalf of the state. Said capital stock shall be exempt from all other taxes, except on that portion of said capital stock which shall consist of and include the real property of such banks or banking association; and the real property of all banks or banking associations, shall be assessed and taxed in the city, ward, village, or town where the same is located, for all state, county, town, and corporation purposes, in the name of such bank or banking association: *Provided,*

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that the owner or holder of shares in stock, in any bank or banking association, shall not be taxed as an individual for such shares of stock."

It must be conceded that the mode of taxation here adopted cannot be distinguished, in principle, from that prescribed for the taxation of the property of rail and plank road companies, which was held to be unconstitutional; and that if this were a statute of the ordinary character, or one which the legislature alone could enact, it must, within the principle of the plank road case, be held void. For it seems clear, that if it were a mere ordinary statute, such as the legislature is daily in the habit of passing, it could not be upheld on the ground that it was a contract between the state and the corporation. The existence of such a contract presupposes power on the part of the legislature to enter into it; and if the legislature had no such power, or were plainly prohibited by the constitution, then there would be no contract, and consequently no obligation to be violated. But it is insisted, on the part of the respondent, that the peculiar nature of the statute, and the mode of its enactment, under the constitution, is such that it cannot be governed by the doctrine there laid down; that it is not an exercise by the legislature of its general power to levy taxes, which the rule with respect to taxation was designed to limit, but that it is a kind of legislative act of the people, passed and adopted by them in their primary capacity, pursuant to a power reserved by the constitution itself, and therefore is not subject to those constitutional restraints which were designed to limit and control the action of their agents and representatives. We think the position is correct, and that it takes the capital stock of banks and banking associations out of the rule of taxation prescribed by the constitution for other taxable property.

Sections four and five of Article XI of the constitution, are as follows: "Sec. 4. The legislature shall not have power to create, authorize, or incorporate, by general or special law, any bank or banking power or privilege, or any institution or incorporation, having any banking power or privilege whatever, except as provided in this article.

"Sec. 5. The legislature may submit to the voters, at any general election, the question of 'bank or no bank,' and if at any such election, a number of votes equal to a majority of all the votes cast at such election on that subject, shall be in favor of banks, then the legislature shall have power to grant bank charters, or to pass a general banking law, with such restrictions, and under such regulations as they may deem expedient and proper for the security of bill holders: *Provided*, that no such grant or law shall have any force or effect, until the same shall have been submitted to a vote of the electors of the state, at some general election, and been approved by a majority of the votes cast on that subject at such election."

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The law we are considering was enacted under these provisions of the constitution. At first, the legislature could not charter a bank, nor create any banking power or privilege whatever. It could only submit the question of "bank or no bank," to the voters, at some general election. A majority of votes cast at such election having been in favor of banks, it could then grant bank charters, or pass a general banking law, neither of which, however, could be of any force or effect, until submitted to and approved by a majority of the electors voting on that subject at some subsequent general election. This was a substantial reservation to the people themselves, of all legislative power upon the subject of banks and banking. Not only could the legislature not act upon the subject without the assent of the people, but the people retained the power of determining, in every particular, what the bank charters, or general banking law, should be. They could have no force until ratified by a majority of the voters. It is true, the constitution provides that the legislature must act, but only in subordination to the direct action of the people, and as a means of enabling them, in proper form, to express their superior will. The law emanates from the same source as the constitution, and in this respect would seem little inferior in dignity and importance to the constitution. The subject was considered of such gravity and interest, that all authority and control over it was withheld from the legislature, to be exercised by the

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In re Mowry.

people in their sovereign capacity, very much in the manner in which they ratified the constitution, and provided that it might be amended.

The people having reserved the power, it is difficult to see how the restrictions of the constitution can be applied to it. The reservation is absolute and unqualified, and carries with it the authority to prescribe what the law shall be in all respects. The constitution is elsewhere silent upon this particular subject, and leaves the action of the people free and unrestricted. It is so much legislative or political power taken out of its operation, and retained to be acted upon by the people, in the same manner as the constitution itself. It is not, therefore, within the spirit or object of the restrictions of the constitution. They were intended to qualify and control those powers which were delegated to the several departments of the government, and it would be absurd to think of applying them to those which were not so delegated, and which the government, consequently, did not possess. This power being retained in the hands of the people, there was no reason why they should seek to restrict its exercise. They surely were not afraid to trust themselves; and if they had been, we can hardly see how they could have avoided it, since it is one of the essential attributes of sovereignty, that it cannot prescribe limits to its own action. They did not, however, attempt to do so, and the law having been passed in pursuance of a power thus absolutely reserved, we do not see how it can be said to be an infringement of any of the provisions of the constitution.

The demurrer must therefore be overruled.

NOTE.—The opinions in this and the next case, were not received in time to be inserted in their proper place.—R.R.

In the matter of the petition of LUKE MOWRY for a writ of
Habeas Corpus.

Upon a judgment for damages for the wrongful and fraudulent misapplication and conversion of school land certificates, deposited as security for a loan, an

execution against the person may be issued, after the return of an execution against property, unsatisfied in whole or in part.

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The defendant in such a case is not entitled to exemption from imprisonment under section 14 of Article I of the constitution of this state, which provides *In re Mowry*, that "no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied."

Where a sheriff is of opinion that the property of an execution defendant will not sell for enough to pay the expenses of the sale, he may, at his peril, refuse to levy upon it, and stating the facts, return the execution unsatisfied, and such return is *prima facie* sufficient to authorize the issuing of an execution against the person.

Where a petition for a *habeas corpus* alleges that the petitioner is confined in jail on an execution against his person, which was issued irregularly, or in an action in which the petitioner was not liable to arrest, the return of the jailer is sufficient, if it shows that the petitioner is held by virtue of an execution against his person, which is valid upon its face, and which is produced and a copy of it annexed to the return; and the petitioner should allege by way of answer or avoidance, any facts which would show that the imprisonment, though apparently lawful, is really not so.

Nat. Rollins, for petitioner.

Smith, Keyes & Gay, and Wakeley & Tenney, contra.

By the Court, DIXON, C. J. *Certiorari* to the Judge of the Ninth Circuit, to bring up proceedings had before him on an application for a writ of *habeas corpus*, and for the discharge of a petitioner from imprisonment. The return of the judge, so far as it is necessary to state it, shows the following facts:

April 23.

The petitioner, *Luke Mowry*, was brought before him on a *habeas corpus*, allowed on petition, setting forth that the petitioner was confined in the common jail of the county of Dane, upon an execution issued on a judgment rendered in the circuit court for that county, in favor of one *Algernon S. Wood*, and against the petitioner, for a debt arising out of an express contract; that an execution against the property of the petitioner had previously been issued upon the same judgment to the sheriff of Dane county, to whom the petitioner had offered unincumbered real estate belonging to himself in that county, sufficient in value to satisfy the whole or a part of the judgment, and requested that it be seized and sold, and whom he had likewise informed that he owned other unincumbered real estate in the county, which he would turn out in case that offered should prove insufficient; and that the

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sheriff, without the knowledge of the petitioner, and before the expiration of sixty days from the time it was issued, returned the execution unsatisfied, and admitted in his return that the petitioner had offered real estate, upon which he had refused to levy. A copy of the return was annexed to the petition, in which the sheriff certified that he had made diligent search for personal property belonging to the petitioner, with which to satisfy the execution, and that he could find none; and that he had demanded real estate, upon which the petitioner had turned out lot 7, in block 80, in the village of Howard, Dane county, which was worthless, and would not, if sold, pay the expenses of sale; and therefore he returned the execution unsatisfied. The execution against the person was thereupon issued. A copy of each execution was annexed to the petition, and no exception was taken to the form or substance of either, save that the one against the person was not signed by all the attorneys who acted for *Wood* in this suit. It appears that two firms of attorneys appeared for him, and it was subscribed by only one of them. This objection was considered so groundless that it was abandoned in this court.

The keeper of the jail returned that he detained the petitioner by virtue of the execution against his person, which he produced. To this return the petitioner demurred, on the ground that it did not deny that the action was one in which he could not be arrested, and that he had turned out unincumbered real estate upon the execution against his property, on which the sheriff had refused to levy. If the petitioner desired an inquiry into the nature of the action between himself and *Wood*, and the facts touching the service and return of the first execution, as he evidently did, this was an entire mistake of practice. The jailer was only required to return the authority and true cause of imprisonment, as they had come to his knowledge, and it being an execution, he was to annex a copy to his return and produce the original. R. S., chap. 158, sec. 18. This he did, and the execution being valid on its face, constituted, as to him, a good cause for the detention, which the demurrer admitted. Appendix, 3 Hill R., 658, note, 28. The causes assigned for

the demurrer were not matters of fact which the officer, in his return, was bound to admit or deny. They were strictly matters in avoidance of the return, which the petitioner should have alleged and proved, by way of answer, to show that the imprisonment, apparently lawful, was nevertheless not so, and that he was entitled to his discharge. This is the practice clearly indicated by the statute. Sec. 26, chap. 158, R. S.

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The circuit judge, however, overlooked the mistake of the counsel for the petitioner, and proceeded to investigate the merits of his imprisonment, so far as they were made to appear; and we will do the same thing. The record in the case of *Wood vs. Mowry* was produced, but no other proof was offered. A copy of the record is returned by the judge, from which it appears that the action was for *damages alleged to have been sustained by Wood on account of the wrongful and fraudulent misapplication and conversion, by the petitioner, of certain school land certificates*, the property of Wood. The complaint alleged that Wood had borrowed from the petitioner a sum of money, and, to secure the payment of the note, deposited with him the certificates, a description of which was given; that the petitioner had transferred the note to third parties, who had obtained a judgment thereon; that the plaintiff was ready and willing and had offered to pay the judgment to the owners or to the petitioner, provided the certificates were delivered up to him; but that the owners of the judgment could not do so, as they had never had them in their possession, and the petitioner refused, falsely and fraudulently pretending he had sold them as a pledge, when, in truth and in fact, he had wrongfully and fraudulently misapplied and converted them to his own use. The value of the certificates was alleged to have largely exceeded the amount of the note. The petitioner, by his answer, denied the wrongful and fraudulent misapplication and conversion of the certificates, and insisted that he had made sale of them whilst the note was still in his possession, and applied the proceeds in part payment, as it was lawful for him to do. The jury, under the instructions of the court, found him "guilty as charged in the complaint," and assessed the plaintiff's damages, for which the judgment was entered.

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Two questions were considered by the judge: 1. Whether the judgment was for a debt arising out of a contract; and 2. Whether the return of the sheriff to the execution against the property of the petitioner, was sufficient to authorize the issuing of an execution against his person. He decided both against the petitioner; and we think he was unquestionably right.

Section 2 of chapter 127 of the Revised Statutes, provides, among other things, that the defendant may be arrested and held to bail in an action for the recovery of damages, on a cause of action not arising out of contract, where he is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property. Section 7 of chapter 134 provides, that if the action be one in which the defendant might have been arrested under sections 2 and 4 of chapter 127, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part.

The constitution, section 16, Article I, provides, that "no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied."

For the petitioner it is insisted, that as there was a contract between the parties in reference to the certificates, upon which an action might have been maintained, that which was instituted, must be considered as of the same nature, and treated as if brought upon the contract itself. In support of this view, we are referred to the case of *Brown vs. Treat*, 1 Hill, 255, in which it was said, that the act to abolish imprisonment for debt in the state of New York, was intended to reach all cases wherein the plaintiff might, in fact, have given credit to the defendant, and that he could not, by electing to sue in case or trover, change the truth, and deprive the defendant of his privilege. The case did not call for a decision of that question, and the doctrine thus intimated was afterwards directly repudiated, both by the supreme court and by the court for the correction of errors. *Suydam vs. Smith*, 7 Hill, 182; *McDuffie vs. Beddoe*, id., 578.

Admitting the analogy between our constitution and their statute, the authority of that state is clearly against the petitioner. But the statute would seem to be susceptible of the more extended application. The language of the constitution, taken in its broad and popular sense, indicates a right accruing—a sum of money or other thing due or deliverable, by virtue of a contract, expressed between the parties, or implied from their acts and circumstances, or on account of a breach of it in respect to some matter provided for or contemplated by them when it was made—something springing out of the contract, and for the enforcement of which resort must be had to it—and seems not to include damages for those *wrongful* acts which either party may possibly do, and which, when done, are remotely connected with it, but were not anticipated by them at the time of making of it. The act in question was precisely of this character. The complaint charged the petitioner with the fraudulent and wrongful conversion of securities placed in his hands for a specific purpose, and the jury found him guilty. This was an act not within the scope of the contract, and not contemplated or provided for by either party, or at least by *Wood*, at the time the securities were given, and constituted, in the eye of the law, a tort or wrong, which was heretofore redressed by an action on the case. The fact that it was coincident with an implied undertaking on the part of the petitioner not to convert the securities, did not relieve, but aggravated its character as a wrong. There are a great variety of torts connected with contracts, which, when they involve a violation of confidence, increase the moral guilt of the perpetrator. As was observed by the court in *Suydam vs. Smith*, “The man who wrongfully converts to his own use, the property which another has intrusted to his care, is chargeable with a deeper shade of moral guilt, than the one who converts property which he has either found or tortiously taken; for in addition to the wrongful appropriation of another man’s goods, which is common to all the cases, the bailee is guilty of a breach of trust.” The conversion was an unauthorized act, and *Wood’s* claim for damages, will, when analyzed, be found not to have rested upon the contract at all. It was

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founded upon his prior right of property, and the interference of the petitioner in a particular over which the contract gave him no control. It existed, therefore, independently of the contract, and although the contract was set forth in the complaint, it was as inducement merely to the subsequent allegations of the wrong, which constituted the *gravamen* of the action.

As to the return of the execution against property, we think it was sufficient to authorize the issuing of one against the person. The sheriff may not have a very wide discretion in determining the value of property upon which he is to levy, but when he honestly thinks it will not pay the expense of sale, and will, therefore, increase instead of diminishing the amount of the judgment, we think it clear that he may, at his peril, refuse to levy, and stating the facts, return the execution unsatisfied. If it should turn out that he is mistaken, or if he acts in bad faith, he undoubtedly becomes liable to the injured party. Such a case would present a very different question from that now before us. No attempt was made to impeach the return, by showing that the sheriff was mistaken, nor that he acted unfairly, and until that is done, the presumption is in favor of its correctness.

For these reasons, the order of the circuit judge, remanding the petitioner, is affirmed with costs.

DRESSLER vs. DAVIS, and others.

Where a defendant appeals from a judgment of a justice of the peace to the county court, the plaintiff may, by leave of that court, before trial, amend his complaint, by increasing his claim for damages to an amount beyond the jurisdiction of the justice of the peace; and may recover such increased amount, if the justice of his case require it.

APPEAL from the County Court of *Milwaukee* County.

Dressler sued the defendants, *Davis*, *Clark*, and *Stone*, before a justice of the peace, for injuries caused by the

negligent driving of a wagon along a public street, in the city of Milwaukee, demanding, in his complaint, judgment for one hundred dollars. Trial before the justice, and judgment for the plaintiff, from which the defendants appealed to the county court. Upon the case being called in that court, the plaintiff, by leave of the court, and with the consent of the defendants, amended his complaint, by alleging his damages at two hundred dollars, and claiming judgment for that sum. He also discontinued the action as against the defendant *Stone*, amending his complaint accordingly, and upon trial by a jury, obtained a verdict against the other defendants for two hundred dollars. Whereupon the defendants moved the court to set aside the verdict, or that judgment be entered thereon for one hundred dollars only, which motion was overruled; the ruling excepted to; judgment entered upon the verdict, and an appeal taken to this court.

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Finches, Lynde & Miller, for appellants, argued, that the county court, on appeal from a justice of the peace, could not, even with consent of both parties, allow an amendment of the complaint before trial, so as to claim an amount beyond the jurisdiction of the justice, although it might, upon a trial on the merits, give judgment for an amount beyond the justice's jurisdiction, if it should then appear that the plaintiff was properly entitled to it.

Smith & Salomon, for respondent, cited: R. S., 1858, p. 699, sec. 217; *Jackson vs. Covert*, 5 Wend., 139; *Moore vs. Tracy*, 7 id., 229; *Palmer vs. Wylie*, 19 John. Rep., 276; R. S., 1849, p. 478, sec. 244.

By the Court, DIXON, C. J. The cases cited by the respondent's counsel, (19 John., 276; 5 Wend., 139; and 7 id., 229,) fully establish the law of New York under the former statutes of that state to have been, that upon an appeal to the court of common pleas from the judgment of a justice of the peace, the plaintiff, if the justice of his case required it, was entitled to recover in that court a judgment larger in amount than the sum over which the justice had jurisdiction,

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and exceeding the amount of damages claimed in his declaration. The reason assigned, in 19 John., 276, was, that the statute declared that the court of common pleas, having become possessed of the cause, should proceed to give judgment according as the very right of the case should appear, without regard to the previous trial had therein; which, the court said, dispensed with everything inconsistent with the mere justice of the case between the parties. The provisions of our Statutes of 1849, Chap. 88, Sec. 238, were substantially the same. They provided that upon the return being made and filed, the case being such as not to require a trial by jury, the county court should have power to examine and determine the same, and to give such judgment, and make such order in the case, *as law and justice between the parties should require*. The 244th section provided, that the issue before the justice should be tried without other or further new declaration or pleading, except in such cases as should be otherwise directed by the court. The appeal in the present case, however, was taken after the adoption of the Code of Procedure, which prescribed the mode of taking and prosecuting appeals from the judgments of justices of the peace, and repealed all former laws upon the subject. The only provisions of that instrument, material to be noticed in the present inquiry, are to be found in the 81st and 268th sections. The former is identical with section 37 of chap. 125; the latter, with section 217 of chap. 120 of our present Revised Statutes. By the former, the court was empowered, either before or after judgment, in furtherance of justice, and upon such terms as might be proper, to amend any pleadings or proceedings, by adding, striking out, or correcting a mistake in the name of any party, or a mistake in any other respect, or by inserting other allegations material to the case, provided it did not substantially change the claim or defense. By the latter, which concerned appeals, it was provided that, where, as in the present case, the judgment appealed from, exclusive of costs, exceeded fifteen dollars, *the action should be tried in the appellate court as cases originally brought there*.

It was undoubtedly the intention of the legislature, in view of the law as it previously stood, by this last provision, to

place actions thus brought up by appeal, on the same footing as to their hearing and determination, as they would have been if originally commenced in the appellate court, and by so doing, to enable that court to do complete justice between the parties. If for that purpose it became necessary, in the opinion of the court, to allow an amendment by increasing the amount of damages claimed by the plaintiff, that being no change of the nature of his claim, it was as competent for it to do so, as it would have been if the suit had been originally commenced before it. The trial or fair determination of the rights of the parties being the object in view, to secure it, the court had the power to do any act which it could do for the same purpose in any other case. This view is supported by section 269 of the Code, which provided that upon the hearing of an appeal from a judgment, when the sum recovered before the justice, exclusive of costs, was *less than fifteen dollars*, the appellate court should give judgment *according to the justice of the case*, without regard to technical errors or defects which did not affect the merits. It is impossible to believe that the legislature intended to provide for the complete administration of justice in the cases of less, and at the same time intended not to provide for its like administration in those of greater importance. The fact that the defendants consented to the amendment, seems to be of no weight one way or the other, only so far as it may be considered a waiver by them of any objections which they might have urged, or an admission on their part that it was proper.

The judgment of the circuit court is affirmed, with costs.

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RANNEY and another vs. HIGBY.

The construction or legal effect of the contract between the parties in this case, has been settled by former adjudications. 4 Wis., 154; 5 id., 62; 6 id., 28. Where it became necessary on a trial, for the plaintiffs to produce and offer to the defendant a certificate of the receiver of an insurance company, showing the allowance of a claim for loss of certain salt, shipped by plaintiffs to defendant, and lost in a storm, and the plaintiffs, on the trial, produced the

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certificate of said receiver, showing the allowance of a claim, but stating that it was for loss and damage by *fire*, on a marine policy, and there was some evidence before the jury tending to show that the certificate was the identical one issued for the loss of said salt: *Held*, that the recital in the certificate as to the cause of the loss, was not conclusive evidence that the claim certified to, did originate in a loss by fire, and an instruction to that effect, asked for by the plaintiffs, should have been given.

Plaintiffs sent to defendant a statement of their account, containing sundry charges, giving defendant credit for sundry payments, and showing a balance due the plaintiffs of about \$400: *Held*, that plaintiffs were not bound, in bringing suit, to declare for the balance of the general account so exhibited, but might select a single item in their account not larger in amount than such balance, and sue therefor; especially as it appeared that the item selected was the only one in the whole account, about which there was any dispute between the parties.

APPEAL from the Circuit Court for *Milwaukee* County.

A full statement of the facts out of which this suit arose, may be found in 4 Wis., 154; 5 id., 62; and 6 id., 28; and it is deemed necessary to state here only so much of the evidence presented on the last trial, as gave rise to questions not previously decided by the supreme court in this case. The action was *assumpsit*, to recover the price of 350 barrels of salt, sold by the plaintiffs to the defendant, and shipped from Buffalo for Milwaukee, per schooner J. Patton, and lost on the voyage, in a storm. Declaration, the common counts for goods sold, with bill of particulars. Plea, general issue. The plaintiffs had been requested by the defendant to insure the salt for their benefit, and they caused it to be insured in the Utica Insurance Company, insuring at the same time some salt shipped by them on the same vessel to one *McKay*. The Insurance Co. adjusted the loss on both shipments, and gave their acceptance of *Ranney & Co.*'s draft for \$643 75, the amount of both losses, payable May 25th, 1852. The Insurance Co. failed before maturity of the draft, and its assets were placed in the hands of Geo. S. Dana, receiver, who issued to *Ranney & Co.* a certificate, dated Jan. 14th, 1853, stating that they had exhibited to him a claim against the Utica Ins. Co., for loss and damage by fire of certain property, under a *marine* policy of said company, and certifying that said claim was allowed at \$643,75, as of *May 25th*, 1852; the words in italics, and the figures, being written, and the rest of the certificate being in print. The following

indorsement was on the back of the draft; "Certificate given for this draft, January 14th, 1853, for \$643,75. GEO. S. DANA, Receiver." On the trial, the plaintiffs' counsel produced, and offered to the defendant, the abovementioned draft and certificate, subject to *McKay's* interest therein, which defendant refused to receive, but read them in evidence.

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A question was made before the jury, as to whether said draft and certificate were the identical ones which plaintiffs had received on account of the loss of said salt; and instructions were given by the circuit court to the jury, upon that question, which will be found stated sufficiently in the opinion of the court. There had also been other dealings between the parties, and the defendant introduced on the trial, a statement of accounts, which the plaintiffs had sent to him under date of January 31st, 1852, which contained sundry charges for salt shipped to the defendant, including that shipped by the *J. Patton*, and for insurance and interest, amounting in all to \$3,076,09; and gave the defendant credit for three drafts, one for \$1,500, one for \$800, and one for \$400, striking a balance in favor of the plaintiffs, of \$401,98; and also another statement of account sent to them by the plaintiffs, May 26th, 1852, in which the defendant was debited as follows:

1852:—

Jan. 31.—To balance of account rendered,	\$401 98
To paid protest, etc.,	1 70
June 1.—To five months' interest on balance of account,	9 37

\$413 05

The circuit court, at the request of the defendant, instructed the jury, among other things, as follows: 1. That the plaintiffs cannot, in this action, recover a general balance of account, and if the jury find that a draft was drawn against the value of the salt by the plaintiffs on the defendant, and was paid by the defendant, then the plaintiffs cannot recover, although there may be a general balance of account in their favor. 2. That if, in this case, an account existed between

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the plaintiffs and defendant, and it appears to the jury that payments by the defendant have been made to a larger amount than the item sued for, the plaintiffs cannot recover.

3. That when the plaintiffs select certain items of a running account, and bring suit upon such items, it amounts, for the purposes of the suit, to a waiver of the other items; and upon proof by the defendant, of payments applicable to the entire account, to a larger amount than the item sued upon, he is entitled to a verdict.

To these instructions the plaintiffs excepted. The jury found for the defendant, and from the judgment on the verdict, this appeal was taken.

Smith & Salomon, for appellants.

Ogden, Brown & Ogden, for respondent:

Although there might have been a balance, on the general account between the parties, due to the plaintiffs, they have not sued for such balance, and cannot recover it in this action. There was a running account between the parties, upon which the drafts were credited, and a general balance struck by the plaintiffs. This was binding upon them, and they could not select from this general account a single item upon which to sue. The payments were made as well upon that item as all others; the act of the plaintiffs, in suing upon that item alone, amounts to an abandonment of all the others; and if payments applicable upon the entire account are proved to an amount exceeding the item sued on, the plaintiffs cannot resort to the items not declared on, to increase their claim. The defendant has a right to notice, by the declaration, of the entire claim, so that he may disprove any item that is wrong.

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By the Court, DIXON, C. J. This is the fourth time this case has been before this court. Whatever might have been our views as to the construction and effect of the original contract between the parties, were the question *res integra*, it must now, in view of the former adjudications, be regarded as *res adjudicata*.

By those adjudications, (4 Wis, 154, 5 id., 62, and 6 id., 28,) it is established that there was an absolute contract

between them, upon which the defendant was liable to pay the plaintiffs for the salt, notwithstanding it was lost *in transitu*, unless the defendant could show that they had received payment by the money secured upon the policy of insurance; and that the defendant is entitled to the acceptance of the insurance company, for the amount of the loss as adjusted by the plaintiffs. This last proposition seems to establish also, that the defendant is entitled to the certificate of the receiver of the insurance company given for the acceptance, and noted on the back of it. We do not propose to enter into any discussion of the correctness of either of these propositions. Upon the trial, the plaintiffs complied with the last, both with respect to the acceptance and certificate, provided those produced and offered to the defendant were the same received by the plaintiffs, upon which some doubts were raised. Without giving our own impression, formed from the evidence as it appears before us, upon this question of identity, we think that the circuit judge erred in refusing the ninth instruction asked by the plaintiffs' counsel, to-wit: *that the fact that the words, "loss or damage by fire," are found in the certificate of the receiver, is not conclusive evidence that the claim certified originated in a loss by fire.* It certainly needs no argument or citation of authorities to show that such recital in the certificate was not conclusive, and that it might be shown that it was not a loss by fire, and that it was so recited by mistake. It is contended by the counsel for the defendant, that the error committed by this refusal, was rectified in a subsequent portion of the charge, where, he says, it was in substance given. We do not think so. The instruction asked, which was correct, was plainly and pointedly refused. The subsequent instructions, in which the jury were told, that in determining the question of identity, they could consider as strong circumstances, the coincidence of dates, names, signatures, amounts, &c., it is true, look as if it was intended to submit to them the question of identity, notwithstanding the recital; yet from the manner in which they were given, we do not think they were calculated completely to remove from the minds of the jurors, the impression which they

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must have received from such refusal. The jury were not directly told, that if, in their opinion, from the evidence before them, the draft and certificate were given in settlement for the loss of the salt, then their verdict should be for the plaintiffs. Indeed, some portions of the subsequent instructions seem to have an opposite tendency. They were told that there was no explanation of the mistake in the certificate, unless, indeed, they could draw it from the face of the draft, and other parts of the certificate, and that they must take all written instruments in their plain and obvious meaning. This language can hardly be said to be equivalent to giving the instruction asked by the plaintiffs' counsel.

The only other feature in which the case differs from what it was when heretofore before this court, grows out of the introduction in evidence of the statement of account, furnished by the plaintiffs to the defendant, in the letter of January 31st, 1852. The letter in which the balance claimed to be due is stated, and in which it is said the account is inclosed, was in evidence, as appears from the case reported in 5 Wis. We do not see how this varies the case. It is contended that the draft of \$1500 appearing as a general credit in this statement of accounts, is conclusive proof as against the plaintiffs, that the moneys received upon it were applied generally to the account, and that the plaintiffs could not afterwards select a single item, less in amount than the general balance claimed to be due, and sue upon it, but must sue, if at all, for such balance. If this question is not to be regarded as settled by former adjudications in this case, still we do not think the proposition is correct particularly where, as in this case, it appears that the selected item sued upon, is the only one in the whole account about which there is any dispute between the parties. Certainly the defendant cannot complain at this course of proceeding. He is not wronged by it. If after having furnished such statement, the plaintiffs had sought to apply the payment to the disputed or doubtful item, and had then brought suit upon one about which there was no dispute, thus endeavoring to shun an investigation of the

doubtful item, there would be some reason for the rule. June Term,
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But here there is none.

The judgment must be reversed, and a new trial awarded. STREUBEL
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COMPANY.

12	67
80	177
80	181
12	67
94	416
12	67
100	213
100	217

By an act of the legislature, which took effect in April, 1855, it was enacted that, "All railroad corporations within this state, shall be responsible and obligated in law to the laborers on the line or lines of railroads being constructed by said corporations, and are responsible and liable to pay for all labor performed by said laborers, severally, upon said road or roads, to the persons performing such labor * * * and for the purposes of this act, all the usual remedies by action are given to any and all such laborers against any such corporation. * * * No suit shall be maintained under the provisions of this act, until such laborer shall have given thirty days notice in writing to the president or secretary of such company, that wages are due him, and that the company is required to make payment for such wages so due, stating the amount claimed." This act was *repealed* by an act which took effect in March, 1857, and which enacted that, "Whenever any laborer upon any railroad in this state, shall have just claim or demand to the amount of twenty dollars or more, for labor performed on such railroad, against any person being contractor on such railroad with the railroad company for the construction of any part of the railroad of said company, such railroad company shall be liable to pay such laborer the amount of such claim, provided such laborer shall have given notice to such railroad company, within thirty days after such claim or demand shall have accrued that he has such claim or demand, and provided also, such claim or demand shall have accrued within sixty days prior to the giving of such notice, &c.:" *Held*, that a person who performed labor for a sub-contractor, upon one of said railroads, in the summer and fall of the year 1856, and in October of that year gave notice of his claim to such railroad company, as required by the act of 1855, acquired a vested right to recover from such company the wages of such labor, which the act of 1857 could not divest, and an action against the company, for such wages, though not commenced until after the act of 1857 took effect, could be maintained.

COLL, J., *dissenting*.

APPEAL from the circuit court for *Milwaukee* county.

The complaint in this action, which was filed in May, 1857, alleged that the plaintiff, *Streubel*, had performed labor to the amount of \$536, on section 17 of the defendants' railroad, under the employment of a sub-contractor, who

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was engaged in constructing the same; that said labor was performed between the 22d day of April, 1856, and the 18th day of October following; that more than thirty days previous to the commencement of the action, he gave notice in writing to the president or secretary of said railroad company, stating that wages for work done by him as a laborer on the line of said road, were due him, and that said company were required to make payment therefor, stating also the amount of wages so due; that said sub-contractor and the defendant, had always refused to pay him said sum; wherefore, he demanded judgment, &c.

The defendant answered, denying that the plaintiff had performed labor on said road, and, for further answer, alleged that for all the labor done by the plaintiff on said road, he had been fully paid.

On the trial, the plaintiff proved the facts stated in his complaint. The counsel for the defendant, thereupon moved the court for a nonsuit, on the ground that the act of 1855, under which the plaintiff claimed to recover, was repealed by the act of 1857, and that there was no proof of such a notice to the company as the act of 1857 required; which motion the court overruled, on the ground that the service of the notice upon the company, before the passage of the act of 1857, gave the plaintiff a vested right, which subsequent legislation could not impair, to which ruling the defendant excepted. The defendant then proved that the sub-contractor on said section 17, had been fully paid.

The court, among other things, charged the jury: "That the notice to the defendant having been given before the passage of the act of 1857, made the right of the plaintiff to hold the defendant responsible for wages, a vested right, which no subsequent legislation could impair;" to which charge the defendant excepted.

The defendant asked the court to charge the jury as follows: "That the plaintiff has failed to make proof of such a case, as, under the law, entitles him to recover against the defendant, and that their verdict must be for the defendant;" which instruction the court refused to give, and the defendant excepted.

The defendant further asked the court to instruct the jury as follows: "That the law of 1857, entitled 'an act further to protect laborers on railways,' repeals the act entitled, 'an act for the protection of laborers on railroads,' approved March 31st, 1855, and that the plaintiff is seeking to recover under the act of 1855, and the papers in the case show that this suit was not commenced until after the act of 1857 had gone into effect, and that by virtue of the act of 1857, the plaintiff had shown no cause of action against the defendants;" which instruction the court refused to give, and the defendant excepted.

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The jury returned a verdict of \$400 in favor of the plaintiff.

The defendant moved to set aside the verdict and for a new trial, for the reasons, that the court erred in not granting a nonsuit; that the court erred in not giving the specific instructions asked by the defendant; that the court erred in charging the jury that the plaintiff, by serving the notice required by the act of 1855, acquired a vested right, which no subsequent legislation could impair; and that the complaint sets forth no cause of action; which motion the court overruled, (the defendant excepting,) and rendered judgment upon the verdict, from which the railroad company appealed.

Finches, Lynde & Miller, for appellant:

The act of 1855 only gave the laborer on railroads a remedy which he did not have before; and it was competent for the legislature to repeal the act, and cut off or destroy the remedy. The constitutional power of a legislature to enact a law which merely changes or destroys a remedy, is well settled. It has been affirmed in a number of cases, and under various circumstances, as follows: In a case where the creditor, at the time of making the contract, had the right to imprison the debtor, it has been held, that the remedy might lawfully be abolished as to existing as well as future contracts, absolutely or conditionally, by means of insolvent laws. *Sturges vs. Crowninshield*, 4 Wheat, 122, 200, 201; *Mason vs. Haile*, 12 id., 370; *Beers vs. Haughton*, 9 Peters, 329. So as to limitation laws; the legislature may lawfully enact a statute limiting the time within which suits may be brought to enforce demands, where there was before

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no limitation. *Hawkins vs. Barney's lessees*, 5 Peters, 457; *Smith vs. Morrison*, 22 Pick., 430; *Call vs. Hagger*, 8 Mass., 423. So as to an act giving to an assignee the title to all the insolvent's property, *including any which might have been attached on mesne process*. The act was held to apply to a debt contracted before the passage of the act. "It divested the creditor, under certain circumstances, of his remedy by attachment, which existed in full force when the contract was made." *Bigelow vs. Pritchard*, 21 Pick., 169; 3 Denio, 274. So as to a law exempting property from sale on execution, which at the time of making the contract was not exempt. *Morse vs. Gould*, 1 Kernan, 281.

The respondent had no vested right. The *giving of the notice* did not of itself create any liability on the part of the appellant. The law, and not the notice given, fixed the liability. The notice was required to be given simply as a *condition precedent* to the *bringing of the suit*. It did not make the claim of the respondent any more binding upon the company. Session Laws of 1855, p. 87.

G. Von Deutch, for respondent:

The statute of 1855 fixed the liability of the appellant. It is itself the obligation of the contract, and cannot be repealed so as to divest or impair rights acquired under it. *Bruce vs. Schuyler*, 4 Gilm., 221; *Sturges vs. Crowninshield*, 4 Wheat., 122, 197; *F. & M. Bank of Penn. vs. Smith*, 6 Wheat., 131; *Oriental Bank vs. Freeze*, 6 Shep., 109; *Lambertson vs. Hogan*, 2 Barr, 22.

The obligation of a contract is the law which binds the parties to perform their agreement. *Ogden vs. Saunders*, 12 Wheat., 213, 257. Chapter 27 of the laws of 1857, repealed the laws of 1855 referred to, at the same time enacting a substitute, in the main the same as the former act, adding, however, a condition precedent to the liability of the corporation, to wit: the service of the notice within thirty or sixty days (it is doubtful which) after the demand shall have accrued. It is insisted that the plaintiff should show a cause of action within the latter act, as it was in force before the suit was commenced. The absurdity of this position is apparent, as the act was passed four months after the demand

accrued, and requires notice to be given within, at most, June Term, 1860. sixty days after the demand accrued. It would require an act to be done a couple of months in the past. The law of STREUBEL v. MIL. & MISS. R.R. Co. 1857 would be clearly unconstitutional, if it were intended to affect this case; but we hold it to be "a settled rule of construction, that a statute should not have a retrospective operation, unless the intention to have it so operate, is clearly expressed." *Hastings vs. Lane*, 15 Maine, 134; *Oriental Bank vs. Freeze, supra*; *Dash vs. Van Kleeck*, 7 Johns., 477; 3 Dall., 391, 379; 2 Gallis, 139; *Briggs vs. Hubbard*, 19 Vt., 86.

By the Court, DIXON, C. J. Under the common law system of pleading and practice, this would have been denominated an action of *assumpsit* for work and labor. It was commenced by the respondent against the appellant in the circuit court of Milwaukee county, in the month of May, 1857, to recover the price and value of work done by the respondent as a laborer, in the construction of the line of railroad of the appellant, in the year 1856, under the provisions of chap. 86, Laws of 1855, entitled "an act for the protection of laborers on railroads." The respondent was employed as such laborer by a sub-contractor of the appellant. June 19.

Before this action was commenced, viz: on the 28th day of February, 1857, the act above referred to, and under which the respondent performed his labor, was repealed by the third section of chap. 27, Laws of 1857, entitled "an act further to protect laborers on railroads." The act of 1855 was in the following words: "All railroad corporations within this state shall *be responsible and obligated in law* to the laborers on the line or lines of railroads being constructed by said corporations, *and are responsible and liable to pay for all labor performed by said laborers severally, upon said road or roads, to the persons performing such labor*; and it shall be the duty of said corporations, to require of all contractors and sub-contractors ample bond or other security, satisfactory to said corporations, conditioned that all laborers on said road or roads shall be first paid, before the estimates due said contractors or sub-contractors by said corporations, shall be paid by

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said companies to said contractor or contractors, sub-contractor or sub-contractors, *and for the purposes of this act all the usual remedies by action are given to any and all such laborers against any such corporations.* No suit shall be maintained under the provisions of this act, until such laborer shall have given thirty days' notice, in writing, to the president or secretary of such company, that wages are due him, and that the company is required to make payment for such wages so due, stating the amount claimed." The act took effect and was in force from and after its passage. The act of 1857, by the third section of which the foregoing act was repealed, continued the liabilities of railroad companies to pay laborers for work performed on their roads, but provided that such companies should not be liable when the claim or demand of the laborer was less than twenty dollars; that the laborer should give notice to the company, within thirty days after his claim or demand should accrue, that he had such claim or demand; and that such claim or demand should have accrued within sixty days prior to the giving of such notice, which notice should be in writing, specifying the nature and amount of the claim, and be served on the secretary or chief engineer, &c. The notice required by the act of 1855, to be given to the president or secretary of the company, thirty days prior to the commencement of suit, was proved to have been given by the respondent in the month of October, 1856.

Upon the trial the circuit judge instructed the jury, "that the notice to the defendant having been given before the passage of the act of 1857, made the right of the plaintiff to hold the defendant responsible for wages, a vested right, which no subsequent legislation could impair. To this instruction the counsel for the appellant excepted. The counsel for the appellant likewise requested the court to instruct the jury, "that the law of 1857 repealed the law of 1855, and that the plaintiff was seeking to recover under the act of 1855, and that the papers in the case showed that the suit was not commenced until after the act of 1857 had gone into effect, and that, by virtue of the act of 1857, the plaintiff had shown no cause of action against the defendant." This instruction was refused, and the counsel for the appellant

excepted. A verdict having been found for the respondent for the amount of his claim, and judgment thereupon perfected against the company, they appealed to this court, for the purpose of obtaining a review of the questions involved in these exceptions. The cause was argued at the January term, 1859, and the judgment of the circuit court reversed. At the June term, 1859, a motion for rehearing was made and granted. At this time a reargument was had, and it now becomes our duty to express the views of a majority of the court upon the questions presented.

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The former decision of this court proceeds upon the idea that the act of 1855 created, and gave to the laborer, a mere remedy against the company, where by law none before existed; that it did not create or impose upon it any obligation, or give the laborer any right; and that inasmuch as all mere matters of remedy are at all times subject to modification and control by the legislature, its repeal took away such remedy, and no action could thereafter be maintained. With the doctrines of the opinion there given, as to the power of the legislature to regulate, modify, change, or repeal remedies, we entirely concur, but we dissent at the very threshold of the inquiry, as to the construction of the act itself. It is fairly to be implied from the reasons there given, that if by virtue of the act and the subsequent transactions of the parties under it, an obligation or duty was imposed upon the company to pay the respondent for his labor, its subsequent repeal would not have affected his rights; and yet not one word is said by way of showing that no such obligation or duty, on the part of the company, existed or was created. It was taken for granted that there was none. It is needless for us to enter into an argument, or to cite authorities to show that if, by the dealings of the parties while the act was in force, the appellant became obliged, in law, as upon a contract, to pay the respondent for his labor, no subsequent legislation could impair or defeat such obligation. It seems to us that the intention of the legislature to create such obligation, could not by any language have been more plainly and unmistakably manifested. The act declared, that *all railroad corpor-*

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ations within this state should be responsible and obligated in law, to the laborers on the line or lines of railroads being constructed by said corporations, and were responsible and liable to pay for all labor performed by said laborers severally, upon said road or roads, to the persons performing such labor. It furthermore made it the duty of such corporations to secure themselves against such liability, by ample bonds or other securities from their contractors and sub-contractors. The act was prospective, and the power of the legislature, as to all future transactions, to regulate and control contracts, by prescribing the manner in which they shall be made, how they shall be evidenced, and by what forms and ceremonies they shall be solemnized, by declaring what future voluntary acts of parties, in relation to a particular subject matter, shall be deemed a contract, and, if it pleases, by creating implications from such acts, from which certain declared obligations shall flow, cannot be denied or doubted. Instances of the exercise of this legislative power are frequent. It was in the exercise of this power that the act in question was passed. After its passage, and while it was in full force, the appellant carried on the business of constructing its road, and, through the agency of contractors and sub-contractors, contracted with and employed laborers for that purpose. The laborers, through the same agency, contracted with the appellant to perform the labor, and having done so, were entitled to look directly to it for their pay. The appellant, by prosecuting its work, assented to the obligation imposed by law to pay the laborers their wages; and the laborers, relying upon such assent and obligation, performed their work. In this, as in all other cases where contracts are regulated by law, the parties are presumed to have acted with reference to it, to have consented to such conditions and duties as it imposed, and to have acquired such rights as it gave. Their acts are to be interpreted by it. The appellant, by letting its contracts and setting in motion the means by which laborers were employed, thereby agreed and promised to pay them. The laborers, by accepting such employment and doing the work, assented to such agreement and promise. Upon this point, the minds of the parties just as com-

pletely and effectually met, constituting a contract, distinct and independent from that which existed between the laborer and his immediate employer, except so far as the price was concerned, as if they had reduced the agreement to writing, and witnessed it by signatures and seals.

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We are, therefore, of opinion, that the transaction was a contract between the parties, under which the right of the respondent to demand and recover his pay from the appellant, became vested, while the act was in force, and that the legislature could not, by its subsequent repeal, impair or divest them. It could, indeed, repeal the law; but it could not repeal the acts of the parties done under it, or destroy the rights of the respondent, acquired by virtue of such acts. They were past transactions, over which the legislature had no control.

It seems to us that the court, in its former decision, failed to discriminate between a right and a remedy. The refusal of the circuit judge to give the instruction asked by the appellant's counsel, is not referred to or commented upon at all. That portion of the charge in which the circuit judge told the jury, "that the notice to the defendant having been given before the passage of the act of 1857, made the right of the plaintiff to hold the defendant responsible for wages, a vested right," &c., is alone noticed, and arguments are used to show that the giving of this notice was a part of the remedy; and because it was, it was concluded that the act created or gave merely a new remedy, which went down with its repeal, and, therefore, the action could not be maintained. To the point that the giving of the notice was a part of the remedy and no part of the right, we fully assent. The circuit judge was undoubtedly in error, when he said that it was the giving of the notice which vested the right. The giving of the notice was one of the steps made necessary by the statute, towards the enforcement of the previously perfected obligation, by an action in a court of law. It was intended, no doubt, to enable the corporation, by having notice of the nature and extent of the claim, to adjust and pay it, without incurring the expense and trouble of litigation. It was a restriction upon the action or rem-

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edy of the laborer, which the legislature could, and very properly did impose. The legislature foresaw that, without it, the company would be liable to suit at once, without warning as to the amount due, or an opportunity given for voluntary payment. It was the performance of the labor, under an agreement on the part of the company to pay, which gave the right and created the obligation, and these existed just as completely before the giving of the notice as afterwards. If, in an action brought by a laborer, while the act was in force, judgment had gone against him, because he had not given, or for the reason that he failed to prove the service of such notice, such judgment would have been no bar to a future action, commenced after he had given the requisite notice, or when he made the proof of service. Such neglect or failure could have gone only in abatement, which proves clearly, that the giving of the notice pertained to the remedy, and not to the right.

It seems to have been supposed that because the legislature, out of an excess of caution, after having declared that the corporation should be liable to pay for all labor to the persons performing the same, gave to such laborers all "the usual remedies by action," that the case is thereby taken out of the operation of the general rule, and that thereby the legislature had some superior or reserved power to strike down and annihilate the contracts of parties made under the act. We do not think this is so. The rights of the laborers, and their remedies to enforce them, would have been as complete without the clause giving "the usual remedies by action," as with it. The obligation to pay being established by the acts and contract of the parties, the courts of the state would have afforded the laborer a remedy for his damages in case of a breach, as well without as with this clause; and therefore its repeal took nothing away from, as its enactment added nothing to, his rights. He was thereafter at liberty to resort to his remedy as he would have done before, with this difference only, that its repeal removed the restriction of thirty days' notice before suit brought, which he need neither give, aver nor prove.

It is said in the former opinion, that "it is manifest that

the law of 1845 gave a laborer upon a railroad a right of action against a company, where none would have existed at common law. In the ordinary and regular course of justice, the laborer would have been compelled to bring his action alone against the party employing him. But this act, and the subsequent one of 1857, enables a party to bring a suit, under certain limitations, directly against the corporation, *although in fact no contract, express or implied, exists between him and such corporation.* Notwithstanding this additional remedy, the employee might still pursue the principal debtor, and enforce payment against him, if he saw proper. This new remedy is one given by the statute, and the legislature could rightfully alter or modify this remedy, as might be deemed expedient, without affecting any contract existing between the parties." Now, while it is true that the law gave a new remedy, yet it did so by declaring that certain future voluntary acts of the parties should be a contract, by which they should be bound, and for the breach of which courts of law would afford redress in damages. This was the only legitimate and constitutional method of giving the remedy; and we deny that the legislature can by act give a *right* of action, when no contract, express or implied, exists between the parties, except it be for a penalty or forfeiture incurred after the passage of the law inflicting it; or by way of garnishment or warning to a person having property in his hands belonging to a defendant, which is in reality not a *right* of action against the person warned, but a proceeding against the property of the principal debtor in his possession, and in no way affects his right or liabilities. It is plain that the obligations imposed upon the companies were not in the nature of penalties or forfeitures, which would be swept away by a repeal of the law. Nor do they resemble the proceeding of garnishment. Their liability was not made to depend upon the state of their accounts with their contractors or sub-contractors, or upon the fact of their being indebted to them. It was made their duty to indemnify themselves against such liabilities, by securities to be taken from such contractors, and if they did not do so, it was their own fault. It was therefore necessary for the legislature to pro-

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vide for the creation of the obligation by the consent of the parties, before it could give the remedy. The remedy follows the obligation, and gives damages for its violation. It is impossible to conceive of a remedy, in a case like the present, without the existence of the previously broken promise or agreement. The legislature cannot give a remedy against one person to compel him, against his will, to pay the debt of another. It could not give one against the company to compel it to pay the debt of its contractor. It gave the remedy to compel it to pay its own debt and perform its own promise. The fact that the contractors and sub-contractors were likewise holden to pay the laborers, made no difference. It frequently happens that two or more persons are severally bound for the payment of the same debt; and because they are so, the obligation as to any one of them is none the less sacred or binding, until it is discharged by payment. The creditor is at liberty to take as many securities as he pleases, and to resort to any or all of them until his debt is paid. If the act of 1855 had given a specific remedy upon the contract of the company, as *debt* or *covenant*, when by the common law the action would have been *assumpsit*, and the plaintiff, after its repeal, the common law as to remedies being still in force, had brought his action of *debt* or *covenant* instead of *assumpsit*, then we think it would have been a proper case for the application of the doctrines of the former opinion of this court, but now we are of opinion that it is not.

The instruction given containing no error for which the judgment ought to be reversed, and that requested by the counsel for the appellant having been properly refused, the judgment of the circuit court is affirmed.

[Mr. Justice COLE adhering to the opinion of the court, as delivered by him at the January term, 1859, it is here inserted by his direction, as his dissenting opinion.]

COLE, J. The real question in this case is fairly presented by the following instruction, which was given to the jury, by the circuit court, and excepted to by the counsel for the company, to wit: "That the notice to the defendant, having

been given before the passage of the act of 1857, made the right of the plaintiff to hold the defendant responsible for wages, a vested right, which no subsequent legislation could impair."

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The legislature, by chap. 86, Sess. Laws 1855, p. 87, provided, in substance, that all railroad companies within this state, should be obligated, in law, to pay laborers on the lines of railroad being constructed, wages which might be due from any contractor or sub-contractor, and the act gave laborers the usual remedies by action directly against the corporation. The act contained words of restriction, which declared that no suit should be maintained under its provisions until the laborer should have given thirty days' notice in writing to the president or secretary of the company, that wages were due him, and that the company was required to make payment of such wages so due, stating the amount claimed. By chapter 27 of the Sess. Laws of 1857, p. 32, the legislature repealed the aforesaid provision of the act of 1855, and provided in lieu thereof, that whenever any laborer upon any railroad in this state, should have a just claim to the amount of thirty dollars or more, for labor performed on such railroad, against any person being a contractor with the company for the construction of any part of the road, the company should be liable to pay such laborer the amount of such claim; provided the laborer gave notice to the company that he had such claim, within thirty days after the claim had accrued; and provided further, that the claim had accrued within sixty days prior to the giving of the notice.

This is the substance of the two acts which materially affect the correctness of the instruction given.

The action was not commenced until the law of 1857 had gone into effect, and hence it was contended in the circuit court, and the point is relied upon here, that though the work might have been performed, and the notice given, while the act of 1855 was in force, yet it was competent for the legislature to change, and it had, in fact, changed the remedy, before the suit was brought, and that therefore the respondent could not recover, unless his case should come

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within the provisions of the former act. It appears to us that this argument is unanswerable.

It is manifest that the law of 1855 gave a laborer upon a railroad, a right of action against a company, where none would have existed at common law. In the ordinary and regular course of justice, the laborer would have been compelled to bring his action alone against the party employing him. But this act, and the subsequent one of 1857, enables a party to bring a suit, under certain limitations, directly against the corporation, although, in fact, no contract, express or implied, exists between him and such corporation. Notwithstanding this additional remedy, the employee might still pursue the principal debtor, and enforce payment against him, if he saw proper. This new remedy is one given by the statute, and the legislature could rightfully alter or modify this remedy, as might be deemed expedient, without affecting any contract existing between the parties. The circuit court held, that the notice having been given by the respondent before the passage of the act of 1857, that he should hold the company liable for his wages, a vested right accrued to him, which no subsequent legislation could impair. But, as we have remarked, the act of the legislature gave the laborer a remedy against the company—one which he would not have without the statute—and made it the condition of maintaining his suit, that he should give a certain notice. The giving of the notice was a condition precedent to his bringing his action, but how could it create a vested right in the remedy? All the adjudged cases declare the principle, "that legal remedies are, in the fullest sense, under the rightful control of the legislatures of the several states, notwithstanding the provision in the federal constitution, securing the inviolability of contracts; and that it is not a valid objection to legislation on that subject, that the substituted remedy is less beneficial to the creditors than the one which obtained at the time the debt was contracted." *Morse vs. Gould*, 1 Kern, 281; *Bigelow vs. Pritchard*, 21 Pick., 169; *Walter vs. Bacon*, 8 Mass., 468; *Smith vs. Morrison*, 22 Pick., 430;

Stocking vs. Hunt, 3 Denio, 274, and the cases referred to in the above decisions. June Term,
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We do not think the respondent had any vested right in the mere remedy given him by the law of 1855, and as he did not bring his suit until the act of 1857, altering, in some respects, this remedy, had gone into operation, he can only recover under the latter statute. ABLEMAN et al.
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Judgment affirmed.

ABLEMAN and another vs. ROTH and others.

SAME vs. FAIRCHILD and others.

SAME vs. O'GRANNIS and others.

A bill in equity, for the purpose of obtaining a new trial of an action at law, or enjoining the collection of the judgment therein, was properly dismissed by the court, where no evidence was produced, showing, or tending satisfactorily to show, that the complainants had a *good defense* to the action at law, or that the judgment was contrary to equity; although it appeared that the action at law was improperly brought to trial by the plaintiff therein, in violation of a known verbal agreement between the attorneys on both sides for its postponement, whereby the defendants, in such action, and their attorneys, were prevented from being present at the trial, or offering any evidence in support of their plea to such action.

As to the amount of proof which should be required, to show that injustice has been done by a judgment so obtained, the same rule should prevail in a proceeding in equity for a new trial merely, which prevails in a court of law.

APPEALS from the circuit court for *Milwaukee* county.

These cases depended upon substantially the same state of facts, and were heard and decided together. The principal case was as follows: *Ableman* and *Cotton* filed a bill in equity, in February, 1857, against *Nelson Roth*, *Volkert W. Roth*, *S. S. Conover* and one *Donovan*, to enjoin proceedings upon executions, which had been issued upon a judgment in favor of the defendant, *Nelson Roth*, against the complainants. The bill states that on the 20th of December, 1855, *Nelson Roth*, sued the complainants in an action of trover, in the circuit court for Iowa county, to recover the value of certain watches, plate and jewelry, which the complainants, as marshal and deputy marshal of the United States, for

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the district of Wisconsin, had taken, on an execution from the United States court of that district, upon a judgment against said *Volkert W. Roth*; that the property so taken was at the time of said levy, the property of said *Volkert W.*, and subject to said execution; that the same was duly sold by them for \$1741,87, the amount of said execution, and was not, at the time, worth over \$2,200; that the complainants had, therefore, a full and complete defense upon the merits to said action of trover, and that such defense was fully set up in their plea, and notice filed in said cause; that they had issued commissions to take the testimony of witnesses in the state of New York, to be used on the trial of said action, but the taking of one of said depositions having been delayed on account of the absence of the witness, so that it was doubtful whether it would be received in time for a trial of said action at the term of the Iowa circuit court, appointed to commence on the 15th day of September, 1856, it was on the 13th of that month, mutually agreed between A. R. R. Butler, Esq., of Milwaukee, an attorney of the complainants, in said action, and Thomas Hood, Esq., of Madison, the attorney of said *Nelson Roth*, that for the purpose of avoiding unnecessary expense and loss of time, and for the convenience of both parties, the said cause should remain in its then state, and that nothing should be done therein, until the said Thomas Hood should communicate with said Butler, at Milwaukee, and a time should be agreed upon, when the said Hood and Butler should go together to Mineral Point, in the county of Iowa, for the purpose of making some disposition of said cause; that it was further expressly agreed between said Butler and Hood, that said Butler need not, in any event, leave Milwaukee for Mineral Point, before Thursday, the 18th day of said month of September, and not then, unless notified by said Hood to do so, and that if said Butler should be so notified, then, and in no other event, the said Hood and Butler would go together to Mineral Point, to dispose of said cause by trial or otherwise; that said Butler received no communication from said Hood, in the premises, after the said 13th day of September, until Sunday the 21st day of that month, when he received

a letter from said Hood, informing him that said cause was tried on the 18th day of said month, and expressing regret and surprise that a trial had been had without his knowledge, and a judgment entered up therein.

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The bill further states that *Volkert W. Roth* was interested in said judgment; that he was the agent and brother of the said *Nelson Roth*; that he was cognizant of said agreement between said Hood and Butler, and, in utter disregard thereof, went to Mineral Point and retained Samuel Crawford, Esq., to try said cause on the part of the plaintiff, and that on the said 18th day of September, the said *Volkert* being the only or principal witness for the plaintiff, and no attorney present on the part of the complainants, who were defendants therein, said action was tried in the absence of said defendants, and a judgment was entered against them in said action, for \$5,019.38 in damages.

The bill further states, that said *Volkert W. Roth*, as the agent of said *Nelson Roth*, fraudulently procured said judgment to be rendered against the complainants, and fraudulently prevented them from availing themselves of a complete defense to said action, without any fault or negligence on their part, or on the part of their attorneys; that immediately on learning that said cause had been tried, and judgment rendered therein, they prepared and forwarded to be filed, a motion for a new trial in said cause, founded upon an affidavit made by said Butler, setting forth the agreement between him and said Hood, but that the court which tried said action had adjourned for the term, before it was possible to file said motion, and that the same was not filed and could not have been, so as to obtain a new trial, according to the rules and practice of the court.

The bill also states that executions have issued upon said judgment to the defendant *Conover*, as sheriff of Milwaukee county, and to the defendant *Donovan*, as sheriff of Sauk county, and prays for an injunction to restrain the collection of said judgment, and for such other or further relief as the case may require. The bill was verified by the affidavit of one of the complainants, and contained a release of errors in the proceedings at law.

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Nelson Roth and *Volkert W. Roth* filed separate answers, without oath, as required by the bill, denying that the property for which the action of trover was brought, was the property of *Volkert*, but alleging that it was the sole property of said *Nelson Roth*, and that the judgment in said action was according to justice and right. The statements in the answers, as to the agreement between Mr. Butler and Mr. Hood, and the bringing on of the trial, in violation of that agreement, it is not necessary here to repeat, as the court in its opinion, assumes that the allegations of the bill in that behalf were sufficiently proved, and disposes of the case upon another ground; and the testimony introduced in support of those allegations, is for the same reason omitted.

Replications to the answers were filed.

On the hearing of the case, the only evidence was that of E. L. Buttrick and A. R. R. Butler, who were the attorneys employed by the present complainants to defend the action of trover. Mr. Buttrick testified as follows, in reference to the defense which the complainants had to that suit: "We considered that we had a good defense on the merits; we were prepared to defend the suit, and had it not been for the arrangement between Mr. Hood and Mr. Butler, we should have gone to Mineral Point the first day of the term; we had prepared our defense and sent a commission to take testimony in Buffalo." Mr. Butler testified upon that point as follows: "We believed that there was a good defense (in the action of trover) to the entire cause of action, and we set up, by plea and notice, what we believed to be a good and substantial defense on the merits, and what we believed could be sustained by the proofs. I believe that if the facts of our defense had been given in evidence on the trial of the action, we would have defeated a recovery."

On cross examination, Mr. Butler stated: "I have no personal knowledge, except by information acquired as attorney on inquiring, of the facts of the defense in the trover case. My whole knowledge in the matter was derived from hearsay."

Mr. Buttrick also testified to one fact not alleged in the bill, namely, that he started to Mineral Point on Monday, the

22d of September, 1855, for the purpose of applying to have the judgment in said action opened and a new trial granted, but upon reaching Madison he was informed by *Volkert W. Roth*, that the court had adjourned immediately after the action was tried, and therefore did not go to Mineral Point; but that he had since been told by *Mr. Roth* that he was mistaken, and that the court did not in fact adjourn till Tuesday or Wednesday of the next week.

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The circuit court was of opinion that the remedy of the complainants was full and complete in the circuit court of Iowa county, upon application for a new trial; and also that the complainants had failed to furnish evidence that they had a good defense in the action at law, and therefore dismissed the bill. From this judgment, exceptions having been duly taken, the complainants appealed.

Finches, Lynde & Miller, for appellants:

Among the grounds of equitable jurisdiction, is relief against frauds in verdicts, judgments, decrees, and other judicial proceedings. 1 Story's Eq. Jur., § 252.

Equity will relieve by injunction where a judgment has been obtained by fraud, or undue advantage. *Davis vs. Tilston*, 6 How. (U. S.), 114; *Moore vs. Gamble*, 1 Stockton Ch. Rep., 246.

A fraudulent judgment is void in equity as regards the party defrauded. *Humphries vs. Barte*, 10 Smedes & Marshall, 282; *Nelson vs. Rockwell*, 14 Ill., 375.

Courts of equity have power to enjoin against the prosecution of a judgment at law, when by reason of any equitable circumstances, of which courts have cognizance, it is unconscientious for the judgment creditor to pursue it. *Carrington vs. Halabird*, 17 Conn., 537; *Countess of Gainesborough vs. Gifford*, 2 P. Wms., 424; *Huebschmann vs. Baker*, 7 Wis., 542.

Where the defendant is prevented from taking proper measures to defend the action, by the fraudulent assurances of the plaintiff that the suit shall be carried no further, or that no defense is necessary, chancery will interfere to prevent the guilty party from profiting by his own fraud. *Lee vs. Baird*, 4 Hen. & Mun., 427; *Wilrich vs. De Toga*, 2 Gilman, 385;

June Term, 1860. *Truett vs. Wainwright*, 4 id., 418; *Brookes vs. Whitson*, 7 Smedes & Marshall, 513; *Huggins vs. King*, 3 Barbour, 616; *ABLEMAN et al. v. ROY et al.* *Booth vs. Stamper*, 6 Georgia, 172; *Webster vs. Skipwith*, 4 Cush. (Miss.), 341; *Pearce vs. Olney*, 20 Conn., 544.

II. The complainants had no remedy at law. Mr. Buttrick, but for the false and fraudulent misrepresentations of *Roth*, would have gone to Mineral Point, and been there, as the fact turns out, in time to have made his motion to set aside the verdict, before the expiration of the term. He could not make the motion after the term had expired. Rules of Territorial Court; Rules of Circuit Court. But even if we could have made the motion at the next term of the court, we were not obliged to adopt that course. We had our remedy either by motion or bill. It was for the complainants to make the election. It is hard to imagine how a court of law could finally settle the contest, when contradictory *ex parte* affidavits are produced by both the parties. What could the circuit court of Iowa county have done, upon a motion founded upon and resisted by *ex parte* affidavits in this case?

The court has only to read the bill and answers, to see that it would have been almost impossible for that court to have settled the rights of the parties on such a motion. But by the aid of chancery, the real and true facts are brought out. *Truett vs. Wainwright*, 4 Gilman, 418.

Emmons, Van Dyke & Hamilton, for respondents:

I. The bill no where alleges, nor was it attempted to be shown, what the pleadings were in the suit at law, so that the court might judicially determine, whether any evidence, of the character supposed by the complainant to constitute a defense, was admissible or not.

II. The complainants had a full and complete remedy at law, by application to the circuit court of Iowa county, to set aside the judgment, and for a new trial. There is no jurisdiction exercised by courts of record, where a wider range of discretion is allowed, than in the granting of new trials. 1 Gra. & Wat., on New Trials, 7 et seq.; *People vs. Supr. Court of New York*, 5 Wend., 114. Until the adoption of a different rule by the code, the discretion thus exer-

cised was not reviewable upon error. See cases collected in 3 U. S. Dig., 553, § 213. If the circuit court had in fact adjourned when complainants heard of the judgment, they ought to have applied for a stay of proceedings, under rule 37, of the circuit court rules in force at that time. In *Huebschmann vs. Baker*, 7 Wis., 542, the judgment was by default, and the entire term had gone by. Courts of law will always grant new trials for the causes alleged by the complainant. The proper application in this case would have been a motion to set aside the judgment, based upon an affidavit of merits, and of the facts showing it to have been unfairly obtained. It was in fact a default, not for lack of a plea, but a default of appearance at the trial. In such cases, it is the universal practice of courts, to entertain motions to set aside judgments, when made within any reasonable time, and the non-appearance can be excused. *Soul-den vs. Cook*, 4 Wend., 217. Courts of law are constantly in the habit of entertaining motions to set aside judgments, as having been inequitably obtained. *Cogswell vs. Vanderbergh*, 1 Caines' Rep., 155; *Denton vs. Noyes*, 6 John., 296; *Campbell vs. Bristol*, 19 Wend., 101; *Meacham vs. Dudley*, 6 Wend., 514; *Manf. & Mech. Bank vs. Boyd*, 3 Denio, 257.

III. The complainants offered no proof whatever in support of the allegation in the bill that they had a defense to the action at law. It would be idle for courts of equity to grant new trials by way of injunction, without knowing whether or not the party had any defense. Two things must concur: first, it must clearly appear that the party seeking relief has a clear and undoubted defense, upon the merits, to the action at law, and this must be demonstrated by proof as in any other cause in equity; and, secondly, it must appear that the party has been prevented from setting up such defense, by fraud, accident, or mistake, unmixed with any fault, or negligence, on his part. Willard's Eq. Jur., 356, et seq.; 2 Story's Eq. Jur., §§ 894, 895, 896. See *Truly vs. Wanzer*, 5 How. (U. S.), 142; *Marine Insurance Co. vs. Hodgson*, 7 Cranch, 332; 2 Story's Eq. Jur., §§ 887, 888; 3 Johns. Ch. Rep., 356; *Vilas & Bacon vs. Jones*, 1 Coms., 283; *Dodge vs. Strong*, 2 Johns. Ch. Rep., 228; *Mayor of London*

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By the Court, DIXON, C. J. These three cases depend upon substantially the same state of facts, and may therefore be disposed of by one opinion. The views which we have taken, render it unnecessary for us to discuss or determine, whether or not courts of equity have concurrent jurisdiction with courts of law in granting new trials, in actions pending in courts of law. Admitting that they have the power to do so, and that they will exercise it in all cases where the courts of law, in which the actions were pending, would, if the applications had been to them; and admitting, also, that the bills here filed are framed for the purpose of obtaining new trials merely, on account of intervening circumstances, which operated to prevent the plaintiffs from making their defenses, and that they are not designed to obtain permanent and final relief upon facts and circumstances connected with the original controversy, still we are of opinion that the judgment of the circuit court must be affirmed.

The new trials are asked on the ground of fraud. The fraud is alleged to have consisted in the dishonest and treacherous practices of an agent of the defendants, by which the plaintiffs and their attorneys were deceived and prevented from appearing at the first trials, and making their defenses. The bills also allege that the plaintiffs have good and valid defenses to the original actions, which, if they had not been thus deceived and prevented, they could and would have established. On the trials in the court below, the deceitful practices were sufficiently made out, but no legal evidence was offered, proving, or tending satisfactorily to prove, that the plaintiffs had defenses to the whole or any part of the causes of action set forth in the original suits.

The only testimony upon that branch of the cases, was the statements of the two attorneys for the plaintiffs (the defendants in the original suits), neither of whom testified to any knowledge whatever of the facts. One said, "we considered that we had a good defense on the merits;" the

other, "we believed there was a good defense to the entire cause of action, and we set up by plea and notice, what we believed to be a good and substantial defense on the merits, and what we believed could be sustained by the proofs." Tested by the rules which ordinarily govern courts of law and equity in the admissibility and weight of evidence, these statements are entirely incompetent to establish the existence of such defenses. They are hardly sufficient to raise the most shadowy presumption that they existed, or that the judgments, proceedings upon which the plaintiffs seek to restrain, are not in themselves perfectly fair and equitable. It was urged, though not very strenuously, by the appellants' counsel, that in this respect, cases like the present are to be excepted from the general rule. But we know of no warrant or authority for this; nor can we discover any substantial reason why it should be so. We were asked to establish this distinction, in analogy to what was said to be the practice in courts of law, upon applications for new trial. It was said that in those courts, where the proceeding is by motion founded upon *ex parte* affidavits, statements upon information and belief are sufficient, and, therefore, they should be so held in equity. But here, again, we are at fault. We do not so understand the rule at law. With some rare exceptions, the reasons for which must be clearly shown, we understand the practice there to require the affidavits to be made by witnesses, who can testify to a knowledge of the facts concerning which they speak. In the present case, the witnesses do not even depose that they have any information, credible or otherwise, concerning the facts set up by way of defense. It was likewise said that in a court of law judgments like those against which the plaintiffs seek relief, would be set aside without affidavit of merit. No authority was cited, and we know of no case where a judgment regularly obtained will be set aside, without merits being shown. It was furthermore said that the rule of evidence in equity should be relaxed, because the obtaining of a new trial at law is an easy matter, for the reason that the proofs are *ex parte*, the witnesses not subject to cross-examination, and counter affidavits touching the merits of the controversy

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cannot be received. If the meaning of this is, and we can discover no other, that courts of law, by reason of their mode of proceeding in such matters, are more easily deceived and imposed upon by perjury and falsehood than courts of equity, it furnishes the strongest reason why the latter should the more stringently exercise their powers to ascertain the truth. We see no reason for changing the rules of evidence in cases of this nature, and the plaintiffs, having elected or been compelled to seek redress in a court of equity, must be held to a compliance with the law and practice of that court.

The cases, therefore, turn upon the question, whether it was, or was not, necessary for the plaintiffs to give evidence, establishing, or tending to establish, that they had good defenses, which they had set up by way of plea or notice to the original actions. Upon this question, we are clearly of opinion that it was necessary for them to do so, for two reasons: first, because, without such proof, the charge of fraud was not made out; and, second, because a court of equity will not disturb or restrain proceedings upon a judgment at law, unless such judgment be unjust and inequitable in itself.

Upon the first, we say that no deceptive, cunning, or treacherous art or practice, is a fraud, in its legal or equitable sense, unless it results in loss or damage to another. It may be morally dishonest, wrong and indefensible; but it is not actionable in the courts. To be so, it must be injurious. Legal or equitable fraud is well defined by Judge Story (1 Story's Eq. Jur., § 187). He says: "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another." The presumption of law is in favor of the justice of every judgment of a court of competent jurisdiction. There was but one way for the plaintiffs to have shown that the deceitful practices complained of were injurious, or that thereby undue or unconscientious advantages were obtained over them, which was by show-

ing that they had defenses, or in other words, that the judgments were, in whole or in part, unfounded. This they did not do, and therefore the fraud is not shown. The bills allege that by the deceptions practiced, they were cheated out of their defenses. Can the court determine that this was so, until they establish that they had them? Manifestly it cannot.

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Upon the second reason we say, that all courts and writers agree, that equity interferes to stay proceedings at law, only to prevent injustice by the unfair use of the process of the courts in which proceedings are pending. The fundamental and governing principle is, that it is against conscience to permit the party enjoined to proceed. In case of a judgment, it must be shown to be against conscience to allow it to be executed; otherwise the powers of the court will not be called into exercise. In addition to this, the injured party must show, either that he could not have availed himself of the facts which make it unjust, in the court of law, or that he was prevented from so doing by fraud, accident or mistake, without negligence on the part of himself or his agents (2 Story's Eq. Jur., § 887, and cases there cited). Courts of equity will not interfere to grant a new trial, where no substantial right has been lost, and no unfair advantage gained, simply because, by some trick or artifice, a judgment, which is just and equitable in itself, has been obtained in advance of the time when it would otherwise have been rendered. In this respect they follow the practice of courts of law, with whom it is said to be a rule of universal application and controlling efficacy, that where substantial justice has been done, no new trial will be granted; and that their discretion consists in deciding this fundamental question (2 Graham and Waterman on New Trials, 47). It must appear that the judgment is either wholly or partially unfounded, or that the damages were excessive. They do not stay proceedings at law, merely on account of any irregularity or defect of jurisdiction in the court where the action is pending, or when no process has been served on the defendant (2 Story Eq. Jur., § 898; *Sear vs. Woodward*, 8 Ala., 500, 787.

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It is impossible to perceive how the plaintiffs, in these cases, are in a worse position than they would have been, if no process in the original suits had ever been served upon them. In the case of *Chambers vs. Hoadley*, 4 Bibb, 284, a new trial at law was decreed, on account of fraud in procuring the officer to change his return of *non est inventus*, and contrary to the truth, to return the process executed, *it likewise appearing that the judgment was unjust*. In the case of *Stokes vs. Knarr*, decided at the present term, this court determined that it would not grant an injunction to restrain proceedings upon the judgment of a justice of the peace, which, for the sake of the decision, was admitted to be void for want of jurisdiction in the justice at the time it was rendered, because it was not alleged in the complaint that such pretended judgment was inequitable and unjust. The defect of jurisdiction was alleged to have consisted in an illegal adjournment of the cause, after receiving the verdict of the jury, and before pronouncing judgment, as required by statute, whereby jurisdiction was lost. The record being regular on its face, and the time to appeal having expired, the defendant sought relief in equity, which, for the reasons above stated, was denied. The means of taking advantage of the defect at law having been lost by lapse of time, the judgment became as good for all purposes of enforcing payment of the honest debt, as a valid one would have been. It was a kind of "illegal justice," which equity would not disturb.

As to the extent to which the proof that injustice has been done, ought to go, we are of opinion that in proceedings in equity, for a new trial merely, the same rule should prevail as at law. The defense need not be made out clearly and beyond any doubt; but enough should be shown to make it reasonably doubtful in the mind of the court, whether the merits have been fully and fairly tested and determined; and if it is probable from the testimony, that the party applying might succeed, or if he produces such evidence, as convinces the court that he should have an opportunity of submitting his case to a jury, the application should be

granted. *Graham & Waterman, supra*, and authorities there cited; *Cummins vs. Kennedy*, 4 J. J. Marsh., 642.

The judgments of the circuit court are affirmed, with costs.

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The legislature has not the power, either directly or indirectly to divest a municipal corporation of its private property, without the consent of its inhabitants.

The legislature, however, has an undoubted right to change the territorial limits of municipal corporations, and to detach from a town a portion of its territory and annex it to another town; and, in so doing, may provide for an equitable division of the common property.

Where the legislature takes from a town a portion of its territory, which includes land to which it has the exclusive title, and annexes the same to another town or municipality, without providing for the disposal of such land, under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such land, notwithstanding such separation.

By an act of the territorial legislature, approved January 8d, 1838, fractional townships 7 and 8, in Milwaukee county, were formed into a town by the name of the town of Milwaukee, and on the 14th of January, 1846, the supervisors of the town acquired, by purchase, a title to the land in controversy, "in trust for the sole use and benefit of said town forever;" the territorial statute, at the time, giving to every such town, as a body corporate, the power to hold real estate for the public uses of its inhabitants, and convey or dispose of the same as might be deemed conducive to their interests, and providing, also, in case of the division of a town, or annexation of a part thereof to another town, for an equitable partition of such real estate, or apportionment of its proceeds, by the supervisors of the respective towns. The provision for the apportionment of property in case of the division of towns, ceased to be in force from and after the 1st day of May, 1849. On the 31st of January, 1838, a portion of town 7 was incorporated as the village of Milwaukee, but the government of the town of Milwaukee continued over both fractional towns, until January 31st, 1846, when the charter of the city of Milwaukee put an end to the government of the town of Milwaukee, in the territory embraced in the city limits, and the land in controversy continued to be within the town of Milwaukee, until February, 1852, when the limits of the city of Milwaukee were enlarged by an act of the legislature, so as to include said land; none of said acts making any provision for the division or apportionment of the common property: *Held*, that the act extending the limits of the city of Milwaukee over the land in question, did not divest the town of its title thereto.

12	93
76	610

12	93
81	439

12	93
83	381

12	93
67	536

12	93
92	612

12	93
118	*246

12	93
57	251

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APPEAL from the Circuit Court for *Milwaukee* County.

This was an action to recover possession of forty acres of land, situate within the present limits of the city of Milwaukee. On the trial in the circuit court, judgment of nonsuit was entered against the plaintiff. The facts appear sufficiently in the opinion of the court.

J. H. Paine & Son, for appellant:

The territorial statute for the government of towns, in force at the time the plaintiff acquired the land in controversy, is founded on the theory that the mere division of a town and bringing a portion thereof under the jurisdiction of another town, does not divest the former of its title to land lawfully acquired. It is doubtful whether the legislature could legally divest a town of its title, had they attempted directly to do it; much less can a divestiture of title be inferred from a mere division of a town, against the provisions of the statute referred to. The case of *N. Hempstead vs. Hempstead*, 2 Wend., 109, is inapplicable as a rule for this court, because it does not appear that New York had any statutory provisions concerning lands over which a division of towns had brought another jurisdiction.

Jason Downer, for respondent:

The land in controversy was evidently paid for by a tax levied and collected from the whole of the old town of Milwaukee. As that part embraced within the present city limits was by far the most valuable, it probably paid 19-20 of the original purchase money of the land. But the principle on which this case was decided below, is, that by the several acts of the legislature dividing the old town of Milwaukee, no provision is made respecting the common property; and when no such provision is made on the division of a town, the new town owns the land within its boundaries, belonging, before the division, to the old corporation, and the old, those within its boundaries. *N. Hempstead vs. Hempstead*, Hopk., 288; same case, 2 Wend., 109; *Denton vs. Jackson*, 2 John. Ch. Rep., 320; *Medford vs. Pratt*, 4 Pick., 222.

The fact that these town or municipal corporations are not authorized by law to hold land outside of their boundaries, is another reason why the nonsuit was rightly granted.

By the Court, DIXON, C. J. This is an action of ejectment commenced in the circuit court of Milwaukee county, by the town against the city, to recover possession of forty acres of land, situate within the present limits of the city. The town was organized by act of the legislature of the territory of Wisconsin, approved January 3d, 1838. On the 31st of January, 1846, a portion of the town was set off and incorporated into the city. On the 14th of January, 1846, the supervisors of the town, "in trust for the sole use and benefit of said town forever," acquired, by purchase from James Murray and wife, a title in fee simple to the land in question. The conveyance was executed to the supervisors by name, as such, and their successors in office. On the trial, the conveyance from Murray to the supervisors was produced and proved, and a regular chain of title from the government to Murray traced and established. It was admitted that the defendant, the city, was in possession. At the time the land was thus acquired by the town, it lay within its limits, and so continued until the 20th of February, 1852, when, by an act passed by the legislature of the state of Wisconsin, entitled, "an act to consolidate and amend the act to incorporate the city of Milwaukee, and the several acts amendatory thereof," the limits of the city were extended so as to bring it within them. In the original act of the territorial legislature, incorporating the city, and the subsequent act of the legislature of the state, amending and consolidating the same, and the amendments thereto, no provision whatever was made respecting the partition or division of the common property. No mention whatever was made of it. Because no such provision was made by the legislature, and because towns are not authorized to hold land outside of their boundaries, the counsel for the city moved for a judgment of nonsuit in the action, which was granted. From this judgment the present appeal is taken.

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The grounds taken by the counsel for the defendant to sustain in this court the judgment at the circuit, are the same as those there urged upon the motion for a nonsuit. In support of them, he cites the cases of *Denton vs. Jackson*, 2 John. Ch. R., 320; *North Hempstead vs. Hempstead*. Hopk.,

June Term, 1860. 288; the same case in the court of errors, 2 Wend., 109, and *Medford vs. Pratt*, 4 Pick., 222. In order to determine whether those cases sustain the action had in this, it will be necessary briefly to examine them. But before doing so, it will be well to notice the provisions of the territorial statutes in force at the time the town of Milwaukee acquired the land in question, touching the corporate character of the several towns then in existence in the territory, and their capacity and power to acquire, hold and pass the title to real estate.

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By section 1 of chapter 2, part 1st, of an act to provide for the government of the several towns in the territory, and for the revision of county government, approved February 18, 1841, it was enacted, that every town then established, or which might thereafter be established by the legislative assembly of the territory, should be a body corporate, and have capacity, 1. To sue and be sued in the manner prescribed by law. 2. To hold real estate for the public uses of the inhabitants, and to convey the same, either by a vote of the inhabitants or by a deed of their committee or agents. 3. To hold personal estate for the public uses of its inhabitants, and to alienate or dispose of the same, either by vote or otherwise. 4. To hold real and personal estate, in trust for the support of schools, and for the promotion of education within the limits of the town. 5. To make such contracts as may be necessary to the exercise of its corporate or administrative powers. 6. To make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants.

The third section of the same chapter provided, that all acts or proceedings by or against a town, in its corporate capacity, should be in the name of such town, but every conveyance of lands within the limits of such town, made in any manner for the use or benefit of its inhabitants, should have the same effect as if made to the town by name. These provisions being in force at the time the conveyance was made to the supervisors, comment upon them is unnecessary, for the purpose of showing not only that they were enabled to receive it, but that immediately upon its execution and delivery, for the uses therein specified, the title vested abso-

lutely and entirely in the town, and that thereafter it could sell, dispose of, and convey the same, at its own free will and pleasure. From the language of the third section above quoted, it may reasonably be implied, that it was the intention of the territorial legislature that the lands which towns were empowered to acquire, hold, and dispose of, were to be situated within their corporate limits. Such intention is more plainly manifested by the first three sections of the second part of the same chapter, which immediately succeed those above referred to. The first section provided, that where a town seized of lands should be divided into two or more towns, the supervisors of the several towns constituted by such division, should meet as soon as might be, after the first town meeting subsequently held in such towns, and when so met, should have power to make such agreement concerning the disposition to be made of such town lands, and the apportionment of the proceeds, as they should think equitable, and to take all measures, and execute all conveyances, which might be necessary to carry such agreement into effect.

The second section provided, that when any such town should be altered in its limits, by the annexing of a part of its territory to another town or towns, the supervisors of the town from which said territory should be taken, and of the town or towns to which the same should be annexed, should, as soon as might be after such alteration, meet for the purpose, and possess the same power as provided in the first section. By the third section it was enacted, that if no agreement for the disposition of such lands should be made within six months after such division or alteration, then the supervisors of each town, in which any portions of such lands should lie, should proceed to sell and convey such part of said lands as should be included within the limits of said town, as fixed by the division or alteration, and that the proceeds should be apportioned between the several towns interested therein, according to the amount of taxable property in the town so divided or altered, as the same existed immediately before such division or alteration, to be ascertained by the last assessment list of such town. This act was not in force

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at the time of the amendment and consolidation of the charter, and the extension of the corporate limits of the city of Milwaukee, by the act of February 20th, 1852. It was repealed and ceased to be in force, from and after the first day of May, 1849, (Revised Statutes, 1849, Chap. 156, Sec. 4), and, consequently, the last three sections above referred to, have no bearing upon the subsequent legislation of the state, or upon this case, only so far as they go to show the intention of the territorial legislature to limit the power of towns in acquiring real estate to such as should be within their boundaries, and so far, furthermore, as they establish an assurance and pledge of public faith on the part of the territorial government, that no future division or dismemberment of any town should operate to destroy or divest the rights and interests of its inhabitants in and to any lands which it had once lawfully acquired. The formation of our state government in no way affected the condition of either the town or city. When it came into existence, upon the foundation laid by the territorial government, it found and recognized them as existing municipal corporations. They are so recognized in the constitution, and have been so treated in all subsequent legislation. The change from territory to state produced no change in them. The corporation of the town of Milwaukee is to-day the same "artificial, invisible, intangible being," that it was when first organized in 1838. Though it may be more limited in its territorial jurisdiction, in the extent and sphere of its operations as a local government it is nevertheless the same. It was the same in 1852, when it is said to have lost the land in dispute, that it was in 1846, when it acquired it. So far as all past acquisitions of property, real or personal, were concerned, it existed the same at both periods, and still continues to do so, with all its faculties to hold, use and dispose of the same, untouched and unimpaired. Under these circumstances, the present case gives rise to very important questions. Has the legislature the power under our constitution, and under the constitution of the United States, by act, without its assent, to divest the town of its property, and vest it in the city, or any other corporation or person? And, if so, is

the act of severing and withdrawing the property from the political or territorial jurisdiction of the town, and annexing it to or placing it within that of the city, an exercise of such power?

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It will be seen at once that these are very grave and perplexing questions. In deciding them, we have endeavored to give to them that careful consideration which their weight and importance deserve. Questions of a similar character have involved courts of great ability and learning in much doubt and anxiety. We may, therefore, well hesitate and be not too confident in the correctness of our judgment. Within the range of our reading we know of no adjudged case so like the present that we may rest upon it as a direct authority. We are not, however, without expressions of opinion from various learned courts and judges, which tend directly to sustain the conclusions to which we have arrived, whilst we know of none of a clearly opposite tendency.

The operations of government depend, to a very great extent, for their success and accomplishment, upon the existence and agency of municipal corporations, such as counties, towns, cities and villages. Without the delegation of a portion of its powers to them, its ends and objects could not be attained. The purposes for which they are instituted, namely, the cheap, expeditious, and convenient promotion and preservation of good order and good government, demand that they should at all times be subject to legislative modification and control, in order that they may be varied with the ever varying condition of the country, and circumstances, habits and wants of the people. It is the apparent connection which these questions have with the exercise of this legislative power and discretion, that renders their decision perplexing and difficult. We would not unwisely or unnecessarily embarrass its exercise or impair its usefulness. Nevertheless, if by virtue of the provisions of our own constitution, or of the constitution of the United States, the legislature is prohibited from divesting or attempting to divest, without its assent, a municipal corporation of its rights of property lawfully acquired, it is plainly our duty so to declare. We think, under the circumstances of the present

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case, the legislature had no such power. There are those who, independently of constitutional restrictions, and upon general principles, and on the reason and nature of things, hold that legislative bodies have no such authority, and that such a proceeding would not be an act of legislation, but an act of lawless violence. See opinion of Mr. Justice JOHNSON, *Fletcher vs. Peck*, 6 Cranch, 143. The constitutions, state and federal, furnish ample guards against such abuses, without resorting to such general principles.

Within the principles which we have above stated, the power of the legislature to enlarge, restrict, change, modify, control and repeal all merely public corporations, is undoubted. They are established as a part of the police of the state, and to meet the object of their creation, must be subject to such changes as the exigencies of the times require. Hence the power of the legislature to enlarge the limits of the city of Milwaukee so as to embrace within them the land in question, and subject it and those who occupied it, to the jurisdiction and government of the city, cannot be questioned. All persons residing within the limits of such corporations are obliged to be its members, and to submit to the duties imposed by law. All persons holding or owning property within them are, as to it, bound to the same rule of submission.

The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely political power, and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. It might sell its

property, or the same might be lost or destroyed, and yet its powers of government would remain. In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other. This distinction is clearly laid down and established in the case of *Bailey and others vs. The Mayor, &c., of the City of New York*, 3 Hill, 531, and authorities there cited. The inviolability by legislative interposition of the rights and franchises of a private corporation, in cases where there is not, by its charter, or the constitution of the state by which it is granted, a reservation of power to repeal or modify, is demonstrated and established in the case of *Dartmouth College vs. Woodward*, 4 Wheat, 518, by a force of reasoning and power of argument, to the strength and clearness of which nothing can possibly be added. It was there held that the charter of such a corporation was a contract, within the meaning of the first subdivision of section 10 of Article I of the Constitution of the United States, which declares that no state shall pass *any law impairing the obligation of contracts*. The same provision occurs in the 12th section of the 1st article of our state constitution. The reasoning of that case extends as well to the power of the legislature to interfere with the franchises as the rights of property of such corporation; but it is only with respect to the latter that it can be considered applicable to the question we are now considering. And there it is clearly so. Every argument used goes with equal force to prove that the legislature has no power to divest a municipal corporation of its property, previously acquired by purchase or otherwise. This want of power depends, not upon the character of the corporation, but upon the nature of the right. The right to repeal or modify is not a right to interfere with vested rights of property. The former may exist without the latter. If the legislature possessed both, the exercise of one would not depend on the other. How the total repeal of the charter of a municipal corporation, without provision as to the disposition of its property, (a circumstance not likely to occur,) would affect such property, or the rights of its inhabitants, we are

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not called upon here to decide. It is sufficient that the corporation of the town of Milwaukee still continues to exist, and so long as it does so, it is impossible to make a distinction between its rights of property and those of a corporation merely private. Both are, and ought, in the nature of the things, to be equally sacred. In *Terrett vs. Taylor*, 9 Cranch, 43, the right of a state government to dispossess a private corporation of its property, was directly passed upon and denied.

In the cases of *Fletcher vs. Peck*, 6 Cranch, 87, and *Pawlet vs. Clark*, 9 id., 292, it was held that grants of lands by states to individuals or corporations, were contracts within the foregoing provision of the constitution, and that the grantees were thereby protected from molestation by subsequent legislation on the part of such states. If the legislature, in the present instance, without the assent of the town, had attempted, by act, directly to transfer the lands in question from it to the city, or to declare the conveyance from Murray to the supervisors void, or to assert that the title of the town was forfeited, and that the same was vested in the state, could any lawyer be found who would hesitate for one moment to give his opinion, that such legislation was void? And could the legislature, by indirect means, accomplish that which it was impossible for it to do by direct? Did it possess this power as an incident to that of enlarging the limits of the city, or diminishing those of the town? We think not. The only grounds upon which such a pretense could be justified, are, that the property of the town is the property of the state, and therefore subject to its disposal, which needs no argument to refute; or that the separation destroyed the *use*, which carried with it the *right*, and that the city could seize and occupy the land as a sort of *waif*, until the true owner could be let in. We cannot admit that the loss of the use carries with it the right. Under certain circumstances, as in the case of land purchased and used as a highway, which is not designed for, or devoted to, the exclusive use of the inhabitants of the town, but is common to all the people of the state, it might. In such case, the exclusive title of the town, if it may be said to have ever had

any, might be considered at an end, for its continuance would be inconsistent with the general supervision which the officers of every town have, by statute, over the highways within their limits. But suppose a town house, prepared and erected by the inhabitants for the transaction of its public business, and the preservation of its records, should, without provision as to its disposition, be set off into an adjoining town, would the town thereby lose its right of property? Although it would thereby be prevented from using it for the transaction of business, which must be done within its limits, yet might it not sell it, and with the proceeds provide another? It is not, however, every severance of real property from the political jurisdiction of the municipal corporation to which it belongs, that involves a destruction of its use. By the 2d section of the 3d part of the 5th chapter of the act of the territorial legislature, to which we have above referred, it was made the duty of the supervisors of the several towns of the territory, to take charge of, and provide for, the support of the poor within them, agreeably to the provisions of the law. In the discharge of this duty, there can be no doubt that the town could provide itself with houses and lands, suitable for the protection, exercise, and employment of such paupers. And if it should, the separation of such house and lands would not be inconsistent with the continued use by the town. Under such circumstances the use might be less convenient, but it would not be impossible. As the record in the present case does not disclose for what purpose the town owned and occupied the land in question, it is impossible for us to say that its annexation to the city interfered with its use by the town. If the legislature could, by virtue of its power of division or repeal, deprive a town of its property; and if, after having created it and incited it to such acquisitions, by giving it the capacity, it should do so, such proceeding would be, in the highest degree, arbitrary and indefensible. The perfidy of such an act would be acknowledged by all men.

We do not, however, wish to be understood as saying that the legislature may not, upon the repeal of the charter of a municipal corporation, or a division of its territory, provide

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when such provision is made, the assent of the corporations, or inhabitants, is to be presumed. For, generally, it is not to be supposed that such acts would be passed against their wishes and interests, but that they are enacted at their request, and for their good. But where, as in this case, a small portion only of such corporation, in which it has a valuable real estate interest, is set off and annexed to an adjoining corporation, and where, as here, it early asserts its claim to such real estate, and no provision is made in the law concerning the same, we do not think any such assent or request can be presumed. And particularly do we think this to be so, where, as here, no advantage is gained to the divided corporation from such division. The consideration of an advantage gained, often affords the strongest ground for the presumption of assent. Where, therefore, the legislature takes from a town a portion of its territory, which includes lands to which it has the exclusive title, and annexes the same to another town or municipality, without providing for the disposal of such lands, and under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such lands, notwithstanding such separation. The rule of law upon this subject, is well stated by Chief Justice PARSONS, in the case of *The Inhabitants of Windham vs. The Inhabitants of Portland*, 4 Mass., 384. He says: "A town incorporated may acquire property, real or personal; it enjoys corporate rights and privileges, and is subject to obligations and duties. If a part of its territory and inhabitants are separated from it, by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, *unless some new provision be made by the act authorizing the separation.* Thus it would continue seized of all its lands, possessed of all its property, entitled to all its rights of action, bound by all its contracts, and subject to all its duties." This doctrine is sustained by the case of *Medford vs. Pratt*, 4 Pick.,

222, cited by the counsel for the defendant. It was there held, that a meeting-house for public worship, built by a town before its division into parishes, becomes, upon such division, the exclusive property of the first parish. It has always been held in that state, that upon the division of towns (which were parochial as well as municipal in their character, each town constituting, originally, a single parish) into two or more parishes, the parochial property, unless special provision was made, went to the first parish, that is, that portion of the town remaining after the erection of the new parish or parishes, as the original, or representative of the original parish. On this subject the court, in their opinion in that case, say: "The justice of this principle cannot be denied; for the remnant were discharged of no part of their duties or burdens, and the seceders always voluntarily withdrew, carrying with them a great part of the taxable property from which those duties and burdens were before discharged." The same principles are recognized in the cases of *Brunswick vs. Dunning*, 7 Mass., 445; and *Hampshire vs. Franklin*, 16 id., 76, and many others in that state.

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Upon the want of power in the legislature of a state to deprive a municipal corporation of its right of private property, Mr. Justice STORY, in delivering the opinion of the court in the case of *Terrett vs. Taylor*, *supra*, says: "In respect, also, of public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom, and at whose expense it was originally purchased."

And again, the same learned judge, in delivering his opinion in the case of *Dartmouth College vs. Woodward*, at page 624, says: "It may also be admitted that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control. But it will hardly be contended, that in respect to such corporations, the legislative power is so transcendent, that it may, at its will, take away the private property of such corporation, or change the use of its private funds, acquired under the

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The most frequent instances of the application of the rule that legislatures cannot interfere with the rights of property of municipal corporations, are to be found in those cases

where such corporations hold property as trustees, and for purposes other than those which are merely municipal. The reason of this probably is, that in such cases, without the consent of all persons interested, legislatures have no power whatever to interfere, and because in the division or other change of municipal corporations, they have almost invariably provided for the equitable distribution of their property which was strictly corporate, thereby saving interested parties from the necessity of calling upon the courts for assistance. If in the present case the land in question had been acquired and held by the town, under the 4th subdivision of the section of the territorial statute above quoted, "in trust for the support of schools, and for the promotion of education within the limits of the town," it would have been an instance of such special trust. The purposes for which it would then have held the land, would have been distinct from and independent of the purposes of its creation as a municipal government. They would have been educational and not municipal. In such cases, the right of the legislature to intermeddle by dividing or diverting the fund, without the consent of the inhabitants, has been often denied. From some decisions it may even be doubted whether the legislature has, without such consent, the power to repeal or destroy a municipal corporation as such trustee, and whether it is not to be treated, *quoad hoc*, as a separate corporation. Thus, in the case of *Montpelier vs. East Montpelier*, 27 Vermont, 704, by the charter of the original town of Montpelier there were reserved, among others, three rights of land for religious and educational purposes, which, "together with their improvements, rights, rents, profits, dues and interests," were to "remain inalienably appropriated to the uses and purposes for which they were respectively assigned, and to be under the charge, direction and disposal of the inhabitants of said township forever." Subsequently the legislature, by act, abolished the old town, and in its place erected two new towns, named respectively Montpelier and East Montpelier. By the act it was provided, that all property owned or possessed by, or debts or choses in action due to the old town, should thereafter be owned and enjoyed by, and collected

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for the said towns of Montpelier and East Montpelier, in proportion to the grand list of the persons and property within the territorial limits of said towns, for the year when said act was passed. In a suit by Montpelier against East Montpelier, (which latter had obtained the whole of the funds arising from the rents of such lands for the year 1851, and refused to pay over to the former any portion thereof,) to recover its share of such funds in proportion to said grand list, it was held that such trust funds were not within the words of the act, and that neither of said new towns had any legal interest therein. In the opinion, the court refer to and comment upon the case of *Dartmouth College vs. Woodward*, and several others, and say that if the words of the act had extended to these trust funds, it would, without the assent of the inhabitants of the old township, who were to be regarded as the *beneficiaries*, or *cestuis que trust*, have been liable to constitutional objections. If this be so, and such assent could not be obtained, it would seem that the old corporation, for the purpose of such trust, must be still regarded as in existence. For otherwise it is difficult to perceive how the legislature might not defeat the charity, which all agree it cannot do. To the same effect is the case of the *Trustees of the New Gloucester School Fund vs. Bradbury*, 11 Maine, 118, where an act of the legislature of Maine, authorizing the town to choose a new set of trustees, and directing the first trustees to deliver over the property to them, was held unconstitutional. The fund had the effect to reduce the amount to be raised by taxation for the support of schools in the town, whose inhabitants were thus beneficially interested in it, and the case was said to be within the very language of the case of *Dartmouth College vs. Woodward*. An attempt to distinguish between a municipal corporation and a corporation merely private, in respect to such funds, was repudiated.

The court observe that Chief Justice MARSHALL, in delivering the opinion of the court in that case, says: "Strictly speaking, *public* corporations are such only as are founded by the government, for *public* purposes, where the *whole* interests belong to the government;" and that no authority exists in the government to regulate, control, or direct a cor-

poration or its funds, "except where the corporation is in the strictest sense public," that is, where its whole interests and franchises are the exclusive property and domain of the government itself."

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To the same effect, likewise, is the case of *Plymouth vs. Jackson*, 15 Penn. St., 44, where officers elected by the owners of land within the original township of Plymouth, to take charge of funds arising from lands appropriated for the religious, literary and charitable uses of its inhabitants, which officers had by an act of the legislature been declared to be a body corporate by the name of the "Proprietors of Plymouth," were held to be *in esse* as such corporation, notwithstanding a subsequent act of the legislature, dividing the township of Plymouth, and erecting two new townships out of it and some adjoining territory, by the names of *Plymouth* and *Jackson*, and authorizing the inhabitants of *Jackson* to elect officers who were to take charge of a portion of said funds within that township, and to be a corporation by the name of the "Trustees of the township of Jackson." See, also, the cases of *Harrison vs. Bridgeton*, 16 Mass., 16; *Commonwealth vs. Cullen*, 1 Harris, 133; *Brown vs. Hummel*, 6 Barr, 86; and, *Poultney vs. Wells*, 1 Aik., 180, cited by the court of Vermont.

For the reasons which we have thus imperfectly attempted to give, and upon the authorities we have cited, we answer the first question in the negative, and give it as our opinion that the legislature has not the power, under the provision of our constitution and that of the constitution of the United States to which we have referred, either directly or indirectly to divest a municipal corporation of its private property, without the consent of its inhabitants lawfully obtained. Our answer to this question renders it unnecessary for us to notice the other. We will do so only so far as it is necessary, in the opinion of the court, to acquit the legislature of all intention, by the act extending the limits of the city of Milwaukee, to injure or deprive the town of any of its just rights. It is evident to our minds, from all the circumstances, that at the time of the passage of that act the interests of the town in the land were either unknown, or not thought of, and

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Contrary to our intention at the outset, we have examined many authorities and disposed of the case, before noticing those cited and relied upon by the counsel for the city, which we will now proceed to do. And, first, we may notice a view taken by the counsel, upon which hinges, to a great extent, the application which he seeks to make of them to this case. The land in question was purchased on the 14th day of January, 1846. The city was originally chartered on the 31st day of the same month. So that, in reality, the territory constituting the city was, at the time the land was acquired, a part of the town. Upon these facts he says it is to be presumed that the land was paid for with funds raised from the whole taxable property of the town. He furthermore states, that the present limits of the city embrace a much larger portion of the taxable property of the town, as it was before the city was incorporated, than that which was left in the town after such act of incorporation of the city. He, therefore, contends that it was the intention of the legislature, by the separation of 1852, to transfer the property to the city, because the city, having contributed more towards the purchase money, has a better right in equity than the town. In answer to this argument, we may say, that it does not appear from the record that the city paid any portion of the purchase money, nor does the record show what the value of the taxable property of the city, as compared with that of the town, is. We cannot indulge in the presumption that the city paid any portion of the purchase money. The purchase of the land and original incorporation of the city were very nearly contemporaneous acts, and it is quite as natural to suppose that the town paid for the land out of money afterwards raised by the inhabitants, as with funds realized in any other way. But suppose it was paid for in the manner which the counsel invites us to presume, still the inhabitants of the city, by procuring it to be incorporated as such, without any provision as to the land, and by an acquiescence of six years and upwards, must be presumed to have released their interest in it, and to have consented that it re-

main the sole property of the town as it was after such division. The charter of the city must be presumed to have been granted at the request of its inhabitants, and the loss to the town of so much of its taxable property, without a corresponding diminution of the expenses of its government, together with the advantages gained to the inhabitants of the city by their new form of government, furnishes ample consideration for such release, which, under the circumstances, must be presumed. By incorporating the city, without dividing the land, it became the sole property of the town; and, if such effect was inequitable, it was not in the power of the legislature, without the consent of the town, afterwards to remedy the evil. See *Hampshire vs. Franklin*, 16 Mass., 76, where the doctrine of such presumptions, and the power of the legislature, are fully discussed. With these remarks, it will be readily perceived that the cases of *Hempstead vs. Hempstead*, bear very remotely upon the question we are considering, and, with the exception of a single remark, *merely obiter* made by the chancellor in 2 Johnson, and subsequently repeated in Hopkins and Wendell, their authority does not at all conflict with the conclusions to which we have arrived or the cases to which we have referred. It is said that a town cannot "possess any control or rights in or over lands lying within another town." As applied to the facts in those cases, or if understood as limited to the rights of towns to acquire lands outside their boundaries, it is very proper. But, farther than this, we are unwilling to go. There was nothing in the facts of those cases which called for the remark or the establishment of such a principle. Each turned upon the doctrine, in favor of which the courts make many strong arguments, that the act dividing the town of *Hempstead* and creating the town of *North Hempstead* was passed at the request of the inhabitants, and that with their assent it operated as a legislative partition of the common property, which was divided according to the limits of the towns as they existed after the division. Chancellor KENT, in the case in 2 Johnson, says expressly, that "the erection of a new town cannot impair the rights of the old one, and the new town has none but what are given to it

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at the time of creating it, or subsequently." That it was a legislative partition with the consent of the inhabitants, is sustained by the language of the act, long acquiescence, and many express acts on the part of the towns themselves. It was upon this ground the cases were decided. In Hopkins, the chancellor says, that "the legislature, acting upon the application of some, and with the acquiescence of all, divided the town," and concludes his opinion in these words: "The general conclusions from all these views, are, that the division of the original town of *Hempstead*, in 1784, was a legislative partition of the lands of the town between the two new towns; that the partition of these lands by the division of the town, must have been within the contemplation and with the assent of those who solicited and those who acquiesced in the division; and that the partition so made was not inequitable or unjust, in the state of things which then existed."

It follows from the views we have taken, that the judgment of the circuit court must be reversed, and a new trial awarded.

PAINE, J., having been of counsel in this case, was absent.

[NOTE BY DIXON, C. J. Since filing the above opinion, I have been referred to the case of the *City of Louisville vs. Pres. and Trustees of University*, 15 B. Monroe, 642, in which many of the questions involved in this case were before the supreme court of Kentucky, and after an elaborate examination, were determined in accordance with the principles here established. The 29th Vermont has also come to hand, in which, on page 12, the case of *Montpelier vs. East Montpelier*, in equity, is reported. A bill was filed, praying the court of chancery to appoint a trustee to take charge of the property, and execute the trust for the benefit of the inhabitants of the territory which comprised the original township. The repeal of the charter of the original town of Montpelier having left the inhabitants without a trustee, the action was sustained, and a new trustee appointed under the direction of the court.]

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In 1854 A and B made an entry, at the office of the commissioners of school and university lands, of lots 118, 120, 121 and 122, of a certain section No. 16 in

Rock county, and received certificates therefor, and also purchased from the holders two certificates issued by said commissioners in 1850, for lots 117 and 123, in the same section, and a certificate issued by said commissioners in 1853, for lot 116 in the same section. The certificates for lots 117 and 123 were valid; but all the other certificates were void, for the reason that the lots therein mentioned had been sold by said commissioners, in 1850, to other parties, and were again sold by them in 1853 and 1854, at private sale, on account of the non-payment of interest, without having first been offered for resale at public auction, as required by law. Shortly afterwards *A* purchased from *B* his interest in all said certificates, and took an assignment of such interest at the price of \$30 per acre for one-half of the land, after deducting the amount due to the state, both parties supposing, at the time of such assignment, that all said certificates were valid, and *A*, although he knew that said lands had been sold by said commissioners in 1850, being ignorant whether said lands had been offered for resale at public auction or not: *Held*, that *A*'s ignorance that said lands had not been offered for resale at public auction by said commissioners, was such a mistake or ignorance of fact, as gave him a right in equity to a rescission of the contract.

Dixon, C. J., was of opinion that *A* could maintain his action for a rescission of the contract, on the grounds, also, of an implied warranty in the assignment of said certificates, that the same were valid, and of a failure of consideration for the money paid, or agreed to be paid to *B*, in that the instruments assigned were not school land certificates, as they purported to be.

Held, also, that if, in the meantime, *A* had acquired a good title to all said lands, by buying the outstanding valid certificates, at a less price than he had agreed to pay *B* for the invalid ones, the proper measure of relief would be the deduction of one half the sum paid by *A* to perfect his title, from the amount of the purchase money agreed to be paid by him to *B*.

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APPEAL from the circuit court for *Dane* county.

This was an action to recover back money paid by the plaintiff to the defendant, and for other relief. The complaint, as amended, alleges, that on the 2d day of October, 1854, the defendant applied to the commissioners of school and university lands of the state of Wisconsin, to purchase for himself and the plaintiff, jointly, lots Nos. 118, 120, 121 and 122 in section 16, town 4, range 12, in Rock county; that upon such application the commissioners executed certificates of sale for said lots to the plaintiff and defendant, in the usual form, they paying the part of the purchase money required to be paid in hand; that on the 6th of October, 1854, the plaintiff and defendant purchased of one *Perkins*, two certificates issued by said commissioners, bearing date July 12th, 1850, one for the sale of lot 123, and the other

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for lot 117, in section 16, above mentioned, and received from said *Perkins* an assignment of said certificates; that on the 11th of January, 1855, the plaintiff and defendant purchased of *A. Botkin* and *D. M. Seaver*, a certificate issued by said commissioners, dated August 15th, 1853, for lot No. 116, in said section 16, and received from said *Botkin* and *Seaver*, an assignment of said certificate; that on the 3d of June, 1856, the plaintiff and defendant entered into an agreement, whereby the plaintiff purchased of said defendant, his right, title and interest in the lots described in all said certificates, and agreed to pay him therefor, the sum of \$2,154,50, being thirty dollars per acre, for one half of the number of acres of land, after deducting the amount of the purchase money due to the state; that the defendant executed and acknowledged an assignment, in writing, of each of said certificates, in the following words: "For, and in consideration of the sum of one hundred dollars, I hereby assign and transfer all my right and interest in the within certificate, to *Silas Hurd*, June 23d, 1856—W. T. HALL." and the plaintiff paid to the defendant, the sum of \$654,50, and executed his three promissory notes for \$500 each, one of which was payable on the 23d of June, 1857, bearing 12 per cent. interest, and the others were payable in two and three years after date. The complaint further alleges, that at the time the plaintiff and defendant purchased of the state said lots 118, 120, 121 and 122, they believed said lands were subject to entry, and that said commissioners had lawful authority to sell the same, and were ignorant that there was any outstanding claim to the land, held by any other person; that at the time they purchased said certificate for said lot 116 from said *Botkin* and *Seaver*, they believed that said certificate was valid, and were entirely ignorant of the fact, that there was any outstanding claim to said lot, prior or paramount to the right created by said certificate; and that the plaintiff, at the time he purchased of the defendant, his interest in said lands, did not know that there was any prior or paramount claim or right thereto in any other person, or that any other person held any certificate for the purchase of said lands, or any

part thereof, but believed that the defendant was entitled, by virtue of said certificates, to a conveyance from the state, of one-half of each of said lots of land, upon paying the residue of the purchase money, and that the assignment of said certificates by the defendant, would transfer such title to the plaintiff.

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The complaint further alleged, that the plaintiff, shortly after the purchase of said certificates from the defendant, was informed, for the first time, that there were outstanding claims upon said lands, and upon inquiry, ascertained the fact to be, that on the 12th of July, 1850, the said commissioners of school and university lands sold to one Orton said lots 118, 121 and 122, and to one Holton, said lot 120, and to one Haight, said lot 116; and that although said purchasers had made default in the payment of interest accruing upon said certificates, the said commissioners had not re-offered said lots, or any of them, at public sale, as required by the statute in such case, and that therefore said purchasers still retained a right to the conveyance of said lots of land, upon paying the balance due to the state therefor, and that the certificates for said lots 116, 118, 120, 121 and 122, so issued to the plaintiff and defendant, and to said Botkin and Seaver, respectively, were, in fact, issued without authority of law, and were void.

The complaint also alleged that the defendant informed the plaintiff that, at the time of the purchase of said lots from the state, he was told by the said commissioners, that said sales to said Orton and Holton, and the certificates issued to them, had become forfeited, and that said lots were subject to private sale; and that the plaintiff, and, as he believed, the defendant also, was in fact entirely ignorant of what proceedings were necessary to be had, as well as what proceedings had in fact been had, to divest the interest of said Orton and Holton in said lots respectively; but that said plaintiff and defendant, relying upon what they learned from the said commissioners, did, in fact, believe that the proper proceedings had been taken to foreclose the right of Orton and Holton in said lands, and that the state had good right to sell the same to the plaintiff and defendant.

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The complaint further alleged, that the defendant, after notice of the failure of the plaintiff's title under said certificates, transferred before maturity the note which became due June 3d, 1857, and the plaintiff paid the same to the holder; that the defendant is still the holder of the two other notes; that in July, 1857, the plaintiff requested the defendant to deliver up to him said two notes, and refund the money he had paid, and tendered to the defendant the certificates for said lots 118, 120, 121 and 122, with a reassignment of the defendant's interest therein, but the defendant refused to comply with such request; that at the time of said demand, the plaintiff did not know that lot No. 116 had ever been sold to said Haight, or that the certificate for said lot purchased from Botkin & Seaver, was rendered invalid in consequence of the previous sale to said Haight, but the plaintiff had learned that fact since the commencement of this suit. The complaint further stated, that the quantity of land embraced in all said certificates, is 208 1-2 acres; that the certificates bought of said Perkins embraced 60 acres, which are of no greater value per acre than the residue of the land; that the sum of \$654 50, (which the plaintiff paid the defendant at the date of the contract,) is a full consideration for the assignment of the defendant's interest in the certificates for said 60 acres; but that the plaintiff is willing to reassign to the defendant the interest which defendant assigned to him in the certificates purchased of Perkins, and in that purchased from Botkin & Seaver, upon the repayment by the defendant of the money he had advanced upon the contract, and the return to him, of his two promissory notes yet unpaid. The complaint also alleges, that the plaintiff has been informed and believes, that the defendant, at the time he assigned said certificates, knew that the certificates were invalid. Prayer, that the promissory notes unpaid may be delivered up to be cancelled, and that defendant may be ordered to repay the plaintiff the moneys so paid by him, with interest, and receive a reassignment, &c., and for such other or further relief as may be equitable.

The defendant answered the amended complaint by a general denial.

On the trial, the issuing of the certificates by the commissioners of school and university lands, to the plaintiff and defendant, on the 2d day of October, 1854, for lots 118, 120, 121 and 122; the purchase by the plaintiff and defendant from Perkins, of the certificates for lots 117 and 123; the purchase by them from Botkin & Seaver, of the certificate for lot 116; and the assignment by the defendant to the plaintiff, of his interest in all said certificates, as stated in the complaint, were either proved or admitted. It was also proved or admitted, that said lots 118, 120, 121, 122 and 116, had been sold by said commissioners in 1850, to Orton, Holton and Haight, respectively, and that the commissioners had issued certificates of sale for said lots to the plaintiff and defendant, and to said Botkin & Seaver, respectively, without having first offered the lots, or either of them, for resale at public auction, as required by the statute.

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The plaintiff, *Hurd*, was then sworn as a witness in his own behalf, and testified as follows: "The first I knew about the school lands being sold, the defendant came to my house and wanted to borrow some money. He said the school land was advertised for sale, and he was going to buy it or see about it; there was something said by one of us about my going in with him; I let him have what money I had, one hundred dollars or more; *Hall* started to Madison to purchase the lands, and came back and said he had purchased; he said it was for sale, and he purchased it; each one of us paid half the purchase money; I don't know that *Hall* said anything but that the land had been offered for sale by advertisement; he wanted me to go to Milton to see who owned the 60 acres; I went, and found Perkins owned it; he went to Milwaukee and bought that; he went to Madison and bought 20 acres more of Botkin & Seaver; we took possession soon after, and went to making improvements on Perkins' and Botkin's lots; cut wood and fenced one hundred acres. The next spring I was at *Hall's*; he said half was not enough to make a farm; he proposed to cast lots as to who should make the offer to buy or sell, and it fell to my lot to make the offer; I said I would give or take \$30 per acre, deducting what was going to the state; he said he

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would sell, but if I had said \$28 per acre, he would have purchased it; I paid him the money, over six hundred dollars, and gave him notes for \$1,500; I have paid one note of \$500 since, with interest at 12 per cent; it was due June 23d, 1857; the other notes were payable June 23d, 1858, and June 23d, 1859. Before the original summons and complaint in this suit were served, but on the same day, I offered the defendant to reassign the certificates; I tendered him the certificates for lots 118, 120, 121 and 122, with assignments on the back, and asked him to deliver the three notes and pay back the money I had paid him; requested the three notes or the two, and the money I had paid. He said he had nothing to do about it. Two or three weeks after I bought *Hall* out, I was told there was some prospect of my losing my land. *Hall* said he did not believe anything in it; he did not believe the original purchasers would ever redeem it; said he believed the state was holden for the land they sold. I knew of the original sale in 1850."

The following question was propounded to the witness by his own counsel: "What did you know about these lands being forfeited, and who did you learn it from?" Question objected to; objection overruled, and defendant excepted.

Answer. "*Hall* came to me and said it was forfeited, and was advertised for sale."

Also the following question: "State whether you knew anything about the lands being reoffered at public sale; if so, what did you know?" Question objected to; objection overruled, and defendant excepted.

Answer. "I never knew it was necessary to reoffer them at public sale. I never knew anything about their being reoffered. I don't know that I ever told *Hall* that certificate for lot 116 was bad. I had not learned it was bad when this suit was commenced. I think *Hall* did not have a paper with advertisement of school land when we talked about buying. I had seen no advertisement before I and *Hall* purchased."

On cross-examination, the defendant proposed to prove,

by the witness, that he had *purchased* in the original certificates of sale for a small sum, and that he then held said certificates. The plaintiff objected to this evidence; the court sustained the objection; and the defendant excepted.

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The defendant, *Hall*, was then sworn in his own behalf, and testified as follows: "In the winter before *Hurd* and I purchased the land, *Hurd* wanted me to look around and see if we could get hold of this land. The September following my attention was called to the *Democratic Standard*, in which a notice was published, and I took it up to *Hurd*. We examined the advertisement, figured up the amount of interest, principal and penalties, to know how much money we wanted to secure the land. We decided to take lots 120, 121, 122 and 118. Lot 116 we decided not to take, because the amount due was more than the land was worth. I read the advertisement to *Hurd*. I came to Madison, and got new certificates in my name and his. I did not learn where *Perkins* lived, but ascertained he owned certificates for lot 117 and lot 123. I purchased of *Perkins* his old certificates. *Hurd* said he had talked with *Goodrich* about the certificates. It was understood that the Mil. & Miss. R.R. Co. had an interest in the land, although the certificates were issued to Holton and Orton. *Hurd* said they told him that they had paid all they were going to on the land, and if we wanted it, to come and get it. We did not get the certificates until January, 1855. We applied for them the preceding October. It was on the 22d of June, 1856, that I sold out to *Hurd*. We let the writing run back two or three weeks. I knew nothing about the original certificates holding the land, but *Hurd* and I both knew there were such certificates. I knew nothing about the case pending in the supreme court, or the decision, until three or four weeks after we made the writing. *Hurd* took the exclusive possession at once, I reserving the right to take off my wheat. I paid for one-half of the breaking. *Hurd* never offered to rescind the contract. The day before the suit was commenced, he tendered me the four certificates, and the note he had paid. *Hurd* is in possession. The eighty acres cleared is all planted to corn. There is a piece in back of the eighty, that

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Hurd has cut the timber from. Lots 116, 117 and 123 were, at the time of the sale to plaintiff, worth \$35 to \$40 per acre. 118 and 122 were worth \$25 an acre, 121 about the same, 120 not worth more than \$15 to \$18 per acre. I told *Hurd*, in the conversation with him, that I only sold my right, title and interest in the certificates; he was to take all contingencies. He and I both knew the land had not been offered for a resale at public action. I knew it from the advertisement. I never told *Hurd* the school lands had been forfeited according to law. The conversations I have given, were the only ones I had with him."

The advertisement in a newspaper, of which the following is a copy, was here offered in evidence and read:

"FORFEITED SCHOOL LANDS.

Office Commissioners School and University Lands, }
Madison, September 20th, 1854. }

"The following described lands in Rock county, having been forfeited by reason of the non-payment of interest, are subject to private entry by any person applying therefor, at the price named opposite each tract, which includes the amount due at the time of the forfeiture, the interest up to January 1st, 1855, and 5 per cent damages; to the sum of which will be added the cost and charges of advertising and sale. The per centage of the principal payable at the time of purchase, will be fixed by the commissioners, and will not be less than that required at the original sale.

[Here follows a list of lands in which are included lots 118, 120, 121 and 122, with statement of the amount due, &c.]

(Signed)

"ALEXANDER T. GRAY,
Secretary of State.

E. H. JANSEN,
State Treasurer.

GEO. B. SMITH,
Attorney General."

The finding of the circuit court as to matters of fact and its conclusions of law, were in favor of the plaintiff, and

judgment was entered, "That the said contract of sale of all of said lots by said defendant to the said plaintiff, and the assignment of the said seven certificates, be cancelled, rescinded and set aside; that the said two notes now unpaid be delivered up and cancelled; that the said defendant pay to the plaintiff the said \$654.50, and the sum of \$560, with interest thereon, from the time of such payment, and also, one half of all sums paid by the said plaintiff for taxes upon said several lots, and all interest paid by the plaintiff to the state thereon, after deducting from the same the value of the use of said sixty acres, and the benefit derived by the plaintiff therefrom. Or, that the sales of said lots 116, 118, 120, 121 and 122, by defendant to the plaintiff, be set aside, and the assignment of the five certificates therefor, be cancelled, and the said sales as to the lots 117 and 123, do stand, and that the said two notes now unpaid be delivered up and cancelled, and that the value of the said sixty acres in said lots 117 and 123, as compared with the value of the residue, be deducted from the money paid at the time of the purchase, to-wit: the sum of six hundred and fifty-four dollars and fifty cents; and the money paid on the said note, to-wit, the sum of \$560; and that the residue of the said two sums be paid by the said defendant to the plaintiff; that the said defendant have his election whether he will have the assignment of the seven certificates cancelled, or the assignment of the said five certificates only; that it be referred to a court commissioner to make and state an account, &c., and report the same to the court, and upon the coming in and confirmation of such report, the defendant shall elect, &c." To the decision and finding of the court, both as to the facts and the law, the defendant excepted, and from the judgment rendered in accordance therewith, the defendant appealed.

Bennett, Sloan & Patten, for appellant:

I. There was no agreement or covenant on the part of the defendant as to the validity of the certificates, nor is he charged with having been guilty of any fraud, misrepresentation or deceit. The plaintiff is therefore without remedy. Where both parties are ignorant of a defect, which renders

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the property sold unavailable to the purchaser, or where a fact in regard to the land is equally unknown to both parties, or each has equal information, or the fact is doubtful from its own nature, and the parties have acted in good faith, equity will not interpose. *Bates vs. Delavan*, 5 Paige, 299; 2 Kent, 470, note; *McCobb vs. Richardson*, 24 Maine, 82; *Gouverneur vs. Elmendorf*, 5 Johns. Ch. R., 79; Rawle on Cov. for Title, 460-1. Courts of equity will not relieve against mere ignorance of law, not coupled with fraud, misrepresentations or undue influence, 1 Story Eq. Jur., p. 132, § 116, and p. 121, § 128. If there be no fraud and no covenants, the purchaser is without remedy either at law or in equity. *Abbott vs. Allen*, 2 Johns, Ch. Rep., 519; 1 Fonb. Eq., 336, note; 4 Cruise Dig., 90; Cooper's Eq. Rep., 311; *Urnstons vs. Pate*, cited Sug. on Vendors, 3d ed., 346-7. But it is said that the parties entered into this contract under a mistake of fact; that they both supposed that the certificates were valid, and that such belief constitutes a mistake of fact. But what fact were they mistaken about? Both testify that they knew these lands had been sold before, and that the original certificates were outstanding. The plaintiff testifies that he was present at the original sale, and also that he never knew it was necessary to re-offer them at public sale, and knew nothing about their being re-offered. The defendant testifies that he and the plaintiff both knew, from the advertisement, that the land had not been offered for re-sale at public auction. If the plaintiff can recover in this action, a quit claim deed is as good in every case of sale of an interest in lands as a warranty deed, for always where a vendee pays a valuable consideration, he believes he is receiving an equivalent, and the vendor either shares in that belief, or is guilty of deceit in concealing the defect in his title.

II. If the fact, at the time of an agreement, is equally unknown to, or is equally within the knowledge of, or is equally accessible to both parties, courts will not relieve in the absence of fraud, misrepresentation or deceit. If the grantee accept a conveyance of land without covenants, he cannot recover back the consideration money; *Rosevelt vs.*

Fulton, 2 Cow., 129; *Taylor vs. Hare*, 1 N. H., 260; 2 Atk., 592; 1 Story Eq. Jur., § 150; 1 Fonb. Eq., B. 1, Ch. 2, § 7, note V; 2 Pow. on Con., 200; 1 Mad. Ch. Pr., 62-4; *Emerson vs. Washington*, 9 Maine, 88; *Norton vs. Marden*, 15 Maine, 45; 4 Green., 101; 14 Me., 133; 1 Wend., 185.

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III. If there was any mistake in this case, it was a mistake of law, as to the validity of the session law of 1853, ch. 43; and no authorities need be cited to show that a party is not entitled to relief on account of a mistake of law.

IV. The court erred in excluding the evidence offered by the defendant, to show that the plaintiff had purchased in the original certificates for a smaller sum; 2 Parsons on Con., 498-9; *Tanner vs. Livingston*, 12 Wend., 83; *Sping vs. Chase*, 22 Maine, 505; *Leffingwell vs. Elliot*, 8 Pick., 455; 10 id., 204; *Loomis vs. Bedel*, 11 N. H., 74, 87; *Smith vs. Compton*, 3 Barn. & Adol., 407.

Williams & Patterson, for respondent:

A mistake of law occurs when a person is truly acquainted with the existence or non-existence of all the facts, but is ignorant of the legal consequences. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist, which really does not exist. 2 Ev. Poth. App., 437, (379). The mistake of the parties in this case was purely a mistake of fact, and the plaintiff was entitled to the relief granted in the court below. *Union Bank vs. Bank of the U. S.*, 3 Mass., 74; *Haven vs. Foster*, 9 Pick., 112; *Mowatt vs. Wright*, 1 Wend., 355; *Burr vs. Veeder*, 3 Wend., 412; Smith on contracts, 421 (a); 2 Smith's Leading Cases, 237; 1 Story's Eq. Jur., 162-70; 1 Vesey Sen., 126; *Irick vs. Fulton*, 3 Grat., 193; *Bell vs. Gardiner*, 4 M. & G., 11, (43, E. C. L., 16); *Milnes vs. Duncan*, 6 B. & C., 671, (13 E. C. L., 293); *Kelly vs. Solari*, 9 M. & W., 54; *Gompertz vs. Bartlett*, 24 Eng. L. & E. R., 156; *Young vs. Cole*, 3 Bing. N. C., 724, (32 E. C. L., 302); *Lambert vs. Heath*, 15 M. & W., 484.

If this was not a mistake of fact, it was such a mistake of law or of mixed law and fact, as courts of equity will relieve against. *Champlin vs. Laytin*, 6 Paige, 189; *Same vs. Same*,

June Term, 1860. 18 Wend., 407; *Many vs. Beekman Iron Co.*, 9 Paige, 188; *Schermerhorn vs. Barhydt*, 9 Paige, 28; *Pitcher vs. Turin Pl. R. Co.*, 10 Barb., 476; 3 B. Monroe, 514; 11 Ohio, 223, 480; Hurd v. Hall. 5 Conn., 528; 9 Paige, 443; 14 Ill., 286; 7 How., (U. S.), 133; *Moredock vs. Rawlings*, 8 Mon., 73; *Bedel vs. Smith*, id., 290; *Tribble vs. Davis*, 3 J. J. Marsh., 633.

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By the Court, DIXON, C. J. That both the parties to this suit acted under a radical mistake, either in matters of law or in matters of fact, in the transaction disclosed by the record, can hardly admit of denial or doubt. That such was the case with the plaintiff seems still less questionable. It is impossible to suppose that he would have purchased the certificates in question at the price agreed upon, if he had known that they were worth less than so many pieces of blank paper. The fact that they were so, proves almost conclusively that he was in some way deluded or misled. As it is only against mistakes of fact that courts will grant relief, it becomes necessary, in the first instance, to ascertain the nature of that here complained of, in order to determine whether the plaintiff is entitled to maintain his action on that ground. If it was a mistake of law, there being no averment or proof that any fraud or imposition was practiced upon him, he must abide the consequences of his ignorance, and cannot, on that account, be permitted to avoid his contract. But if it was a mistake of fact, the action may be maintained, unless it falls within some of the exceptions to the general rule, that "ignorance of a material fact may excuse a party from the legal consequence of his conduct."

A mistake of law happens, when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment, upon facts as they really are; and like a correct opinion, which is law, necessarily presupposes that the person forming it, is in full possession of them. The facts precede the law, and the true and false opinion alike imply an acquaintance with them. Neither can exist without it. The one is the result of a correct application to them of legal

principles, which every man is presumed to know, and is called law; the other the result of a faulty application, and is called a mistake of the law. I do not find, in any of the reports or commentaries, a concise and accurate definition of such mistake; but, after an examination of the principal adjudged cases, I believe that the foregoing is substantially correct. I believe, also, that no case will be found, where courts have refused relief on the ground of a mistake of law, in which it did not clearly appear that the party to whom such relief was denied, was fully apprised of all the facts from which such mistaken conclusion was drawn; and that those instances of confused mistake of law and fact, where relief has sometimes been given, and sometimes denied, and which may at first seem to be exceptions to this rule, will, when closely scrutinized, be found not to be so, but to fall within the rule and its exceptions, that *ignorantia facti excusat*.

An error of fact, *ignorantia facti*, is ordinarily said to take place, either when some fact which really exists, is unknown, or some fact is supposed to exist, which really does not exist. The most frequent, familiar and striking examples of such error, are found in those cases in which the books abound, and to which we need not here particularly refer, where the parties are deceived or mistaken as to the existence or non-existence of certain facts, materially affecting the transaction, and which are present in their minds at the time of entering into the agreement, and directly influence their conduct in so doing. But as is implied from the maxim, *ignorantia facti excusat*, and from the definition which we have given, of a mistake of law, a *mistake of fact* has, in legal parlance, a much more enlarged signification, and extends to and includes the case of a party who, through *mere ignorance* of the existence or non-existence of a material fact, is induced to do an act, or enter into a contract injurious to himself, where, if he had been informed of the existence or non-existence of such fact, he would not have performed such act or made such contract. Ignorance of the existence or non-existence of a material fact, precludes the idea that the party, at the time of the transaction, should have been influ-

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enced by it, for it is impossible that the mind should be moved by that of which it knows nothing. This ignorance of facts must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed, that if a party might, by the exercise of reasonable diligence, have ascertained the facts, he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The later cases establish the doctrine, that whenever there is a clear *bona fide* mistake, ignorance or forgetfulness of facts, the contract may, on that account, be avoided. The following cases illustrate the doctrine that mere ignorance or forgetfulness of facts, without intentional neglect to examine them, excuses, and, in some particulars, seem to bear strongly on the present case. In *Milnes vs. Duncan*, 6 B. & C., 671, (13 E. C. L., 293,) an action for money paid in ignorance of fact, was sustained under the following circumstances: A bill of exchange, drawn in Ireland upon the stamp required by law there, but which was less than the stamp required for such a bill drawn in England, was negotiated and sold in England. There was nothing on the face of the bill to show that it was drawn in Ireland. The holder in England neglected to present it for payment, and held it for a month after it was due. The acceptor having become bankrupt, the holder applied to the endorser, from whom he had received it, for payment. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened suit, alleging that the bill was void for being drawn on an improper stamp. The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in England, and ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder.

In the case of *Kelly vs. Solari*, 9 M. & W., 54, it was held, that money paid under a *bona fide* forgetfulness of facts, might be recovered back in an action for money had and received. The late husband of the defendant had effected a policy on his life in the Argus Assurance Company. He died in October, 1840, leaving the defendant his executrix,

not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November the actuary of the office informed two of the directors that the policy had lapsed by reason of the non-payment of the premium, and one of them, thereupon, wrote upon the policy, in pencil, the word "lapsed." In February, 1841, the defendant, as executrix, applied at the office for, and received from the same and a third director, payment of the sum secured on the policy. The two directors stated in evidence, that they had entirely forgotten, at the time of payment, that the policy had lapsed. Lord ABINGER, C. B., says: "I think the knowledge of facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment." PARKE, B., says: "If indeed the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact." To the same effect is the case of *Bell vs. Gardiner*, 4 M. & G., 11, (43 E. C. L., 16,) where it was held to be a good defense to a promissory note, that it was given by the maker in payment of a bill of exchange which he had endorsed for the accommodation of the drawer, and which bill, after it was so endorsed, had, with the consent of the drawer, been altered in a material point, of which alteration the maker of the note, *though he had ample means of knowing it*, was ignorant at the time he gave it. The court say: "that it must now be taken, that it is no answer in an action for money had and received, brought to recover back money paid by mistake, to say that the party had the means of knowing the facts, if he had not the knowledge in reality." Such means of knowledge are strong circumstances to go to the jury, to prove that the party had the knowledge, but do not preclude a recovery.

These cases are understood as expressing the doctrines of

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the English courts, except in cases where the party is chargeable by law with constructive notice of the facts, or where he willfully assumes them, or waives an investigation after his attention has been invited to them; or where motives of public policy require that he should bear the consequences of his mistake, such as a mistake by bankers in the payment of forged bank notes or drafts.

The case of *Champlin and others vs. Laytin*, and *Laytin vs. Champlin and others*, in the court of chancery of New York, 6 Paige, 189, and afterwards in the court of errors, 18 Wend., 407, cited by the counsel for the defendant, so strikingly resembles that which we are now considering, in many of its features, its doctrines so clearly accord with those of the English courts, and sustain the definitions we have given of a mistake of law, and a mistake of fact, that we feel warranted in stating the facts, and the conclusions of Chancellor WALWORTH and Judge BRONSON, somewhat minutely. The facts, as they appear from the opinions of Judge BRONSON and Vice-Chancellor McCOUN, were these. Fifth street, in the city of New York, running from Broadway to Mercer street, through lands owned by Elizabeth Dupeyster, deceased, of whose estate Champlin and others were executors and trustees, was laid down on a map, made for the corporation of the city in the year 1817. In 1821, the executors caused a map of the lands of the testatrix to be made, on which Fifth street was laid down to correspond with the city map. They afterwards made sales in pursuance of this survey, and, in January, 1822, they sold and conveyed a lot to Samuel Whittemore, extending from Broadway to Mercer street, and which, by the terms of the deed, was bounded on one side for the whole distance by Fifth street. According to the decision of the supreme court of that state, made in 1825, *Mercer Street Case*, 4 Cowen, 542, such sale and conveyance did not amount to an implied grant of a right of way to the purchaser over the proposed street, and the executors, when the street should be opened, would be entitled to be paid the full value of the land, without regard to the supposed easement. The executors, acting on their belief that their sale to Whittemore had not affected their

interest in the land required for the proposed street, surveyed the same into lots, and in January, 1828, sold and conveyed to Laytin, the two lots which were the subject of controversy in that suit. In the case of *Lewis Street*, 2 Wend., 472, decided in 1829, the case of *Mercer Street* was reconsidered and overruled; and the principle of the last decision was approved in several subsequent decisions. After the decision in the case of *Lewis Street*, the corporation of the city ordered Fifth street to be opened, and Laytin was only allowed a nominal consideration, five dollars, for his two lots, on the ground that the previous acts of the executors, in selling and bounding lots on the streets, amounted to a grant of a perpetual easement, or right of way over the land. Laytin purchased the lots at the price of \$4,300, one-half of which he paid down, and gave his bonds and mortgages to secure the residue. Before the conveyance to him was executed, he was informed that his two lots lay in the site of the proposed street. Both he and the executors entertained the belief, that he would acquire a perfect title to the lots, and should the street be opened, he would be entitled to receive full compensation for the land, without prejudice from any previous acts of the executors. In 1836 the executors filed their bill for a foreclosure and sale under the mortgages, and for a decree over against Laytin for any deficiency. Laytin filed his cross bill to have the mortgages given up and cancelled, and for a return of the money paid by him on account of the purchase, on the ground of mistake. This led to the discussion of the question whether it was a mistake of law or a mistake of fact, and if it was a mistake of law, whether Laytin was entitled to relief on that ground. The Vice-Chancellor held that it was a mistake of law, and that he was entitled to relief on account of it. The Chancellor and Judge BRONSON, and with him the court of errors, except PAIGE, Senator, repudiated the doctrine that a mistake of law could be relieved against, but held that it was a mistake of fact, and that on that account he was entitled to have the mortgages given up and cancelled, and the purchase money refunded. It will be recollected, that by the terms of the conveyance to Whittemore, his

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lots were bounded on Fifth street. The executors, in their answer to the cross bill, admitted that, in the full belief that they had a perfect title to the lots, they so represented to Laytin, at the time of the sale; but they relied on showing that he had knowledge of the contents of the Whittemore deed, through Mr. Fitch, who was his counsel at the time of his purchase, and who made an abstract of the title, in which that deed was conspicuously noted. On his examination, he said, that in the registered certificate annexed to his notes of searches, that deed was mentioned, and he gave a copy of the short note made by the register, in which the lot was described as "No. 7, Dupeyster's map." He added, that he did not remember examining the deed; he thought it very doubtful whether he did, for he saw that number on the map, and it was not the property he was searching for. He further said, that he had no recollection of having examined the record of any of the deeds referred to by the register. He thought he did not. The Chancellor and Judge both observed that it was not a case for the application of the doctrine of constructive notice, for the reason that the Whittemore deed did not constitute a link in the chain of title which Laytin was investigating, and through which he claimed; and because the testimony of Fitch did not establish that he had knowledge of the fact, that, by the terms of the conveyance, Whittemore's lot was bounded by the street, they held that it was a mistake of fact. Though much reliance is put upon the fact, that the executors, in good faith, represented their title as good, still a much stronger case, showing that the *mere ignorance of a fact will excuse*, under circumstances, where the exercise of very slight diligence in making inquiry, would have placed the party in possession of it, where the means of knowledge were at hand, and where his attention was apparently called to its investigation, cannot well be put.

The material fact upon which the rights of the parties turned, was the bounding of the Whittemore lot by the street in the deed to him, and because it did not affirmatively appear that Laytin's attorney had notice of it, he was relieved. The attorney and Laytin himself both knew of the map of

1817, and of the sale and conveyance to Whittemore, and that it was made by that map, and where his deed was recorded; but it did not appear that they had ever read or knew its contents. The court seem to have gone upon the doctrine, that where it is evident that a party was laboring under an injurious mistake, either of law or of fact, and the testimony does not clearly show that he knew the facts, or leaves it doubtful whether he did or did not, that it will be taken to be a mistake of fact; and that under such circumstances the burden of showing that he knew the facts, and that therefore it was a mistake of law, will be thrown on his antagonist, who seeks to take an unfair and unconscionable advantage of him. Because the executors did not show that Laytin knew the facts, they were decreed to surrender the mortgages and refund the purchase money. A mistake of law cannot be presumed. The presumption is the other way; and from its nature, the court must be able to say that the facts were known, before it can say that the mistake has been committed. For otherwise it would at once be indulging in two contradictory and conflicting presumptions; that the party both knew and did not know the law, at the same time; which would be absurd. Nor will the court, for the sake of burdening a party with a penalty, and of giving his adversary an undue advantage, first presume that he knew the facts, and upon such presumption, inflict upon him the dangerous responsibility of knowing the law. It must first be shown that he knew the facts, with which an acquaintance cannot be presumed, and then he is responsible for a proper application of the law. 1 Story's Eq. Jur., § 140.

An application of the foregoing principles to the facts of the present case, renders its determination a very plain matter. The material fact upon which the validity of the certificates for lots 116, 118, 120, 121 and 122 depends, is whether the commissioners of the school and university lands did, in the years 1853 and 1854, reoffer the lots for sale at public auction, by reason of the non-payment of the interest and damages due for those years upon the certificates of sale of them made in 1850. If they did, then

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the certificates were valid, and the title of the holders, subject to the payment of the purchase money and interest, was good; otherwise they were invalid, and conveyed no interest in the lots; the rights of the holders of the certificates of 1850 were unforfeited, and the lands were not subject to private entry. There is no dispute that the lands were not so reoffered, which, under the decision of this court, in *Damman vs. The Commissioners of the School and University Lands*, 4 Wis., 114, renders them void. Both parties knew of the sales of 1850, and that the certificates then issued were outstanding. But did they know whether the lots had been reoffered for sale at public auction, so as to work a forfeiture of those certificates, and subject the lots to private entry? *Hall* testifies that he did know it, and therefore, to suppose him to be an innocent party in the transaction, we must believe that he was mistaken in the law, in supposing that no reoffer was necessary in order to enable him to make the entry. Did *Hurd* know whether such reoffer had been made or not? He testifies positively that he did not; that he did not know that it was necessary to do so. We believe in the truth of his statement, and are fully satisfied that it was so. He was wholly ignorant upon the matter. It is true that *Hall* attempts to testify that *Hurd* knew that the lots had not been reoffered. But he does it in a manner which leads us almost to doubt whether he knew it himself. He says he knew it from the advertisement of the commissioners; that he exhibited the advertisement to *Hurd*, and therefore he infers that *Hurd* knew it. A copy of the advertisement is contained in the record, and from it we must say that we could draw no such inference. It commences by reciting that "the following described lands in Rock county, *having been forfeited by reason of the non-payment of interest*, are subject to private entry," &c. What was there in this from which an inference was to be drawn, that the lands had not been reoffered? On the other hand, was not the inference the other way? It recited that the lands *had been forfeited*, and the only legal and constitutional mode of forfeiture being that of reoffering them for sale at public auction, the only legitimate inference was that they had been so reoffered. It does not appear

whether or not the parties had actual knowledge of the act of 1853, referred to by the court in the Damman case, and which was there held to be unconstitutional. If they had, it could make no difference. It could furnish no ground for presuming a knowledge of the facts, that the party, if he had known them, might, or would in all probability, have been misled as to the law, or have committed an error, the consequences of which would have been precisely the same as those which arose from his ignorance of the facts. We are of opinion that the mistake complained of was an injurious mistake of fact, and not of law; that it was excusable in its character; and that it is against conscience for the defendant to attempt to enforce the contract; and therefore, that the plaintiff is entitled to maintain his action.

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The argument of the counsel for the defendant, founded upon the character of the instruments transferred, deserves notice. They liken the transaction to a sale of real estate, and say that where there is no fraud, and no covenants are taken to secure the title, and it wholly fails, the purchaser is without a remedy, either at law or in equity. It is said that if the plaintiff can recover in this action, then a quit-claim deed is as good in every case of the sale of an interest in lands as a warranty deed; for in every case the vendee holding title by quit-claim, can, in case of a failure of title, recover back the consideration paid, and he could do no more where he has taken a warranty deed; that in every case of a purchase of land by quit-claim, when the vendee pays a valuable consideration, he does so on the supposition and belief that he receives an interest in the land, which is an equivalent, &c. If the assignments of the certificates in question could be considered as conveyances of real estate, according to any of the forms known to the law or in general use, this argument would undoubtedly be correct. But they are not. The certificates, provided they had been of any validity, were chattels real, and the assignments were the means or evidences of their transfer. They do not purport, nor were they intended, to transfer the title to real estate. The parties were not dealing with reference to, or on the supposition that the title was in either of them. They both

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knew that it was in the state. They only attempted to transfer the certificates, the value of which was governed by the value of the realty which they concerned, and to which they were supposed to be annexed. The certificates being chattels real, and "falling below the character and dignity of a freehold," were only personal estate, and their assignment and transfer are governed by precisely the same rules as the assignment and transfer of other personal property. 2 Kent's Comm., 842. - Such chattels, says Mr. Stephens, 2 Steph. Comm., 65, "when considered in reference to the distinction between real and personal estate, are held to fall under the latter denomination, their incidents being in general the same with those of property in movables." It will, we suppose, hardly be contended that in the case of the sale of a merely personal chattel, or *chose in action*, the purchaser would be precluded from taking advantage of a serious, detrimental mistake of fact, because he did not fortify himself with covenants. See cases of *Moredock vs. Rawlings*, 3 Monroe, 73; *Bedall vs. Stith*, id., 290, and *Tribble vs. Davis*, 3 J. Marshall, 633, where assignments of bonds and contracts for the conveyance of real estate are placed, by the court of appeals of Kentucky, on the same footing as assignments of other assignable instruments; and where it is said that upon such assignments there is, without express words, an implied undertaking on the part of the assignors, that the makers of the bonds or contracts have title, and will convey and are responsible for the damages in case of failure to do so; and if the assignees, with due diligence, are unsuccessful in obtaining either title or damages, they may sue for and recover back the purchase money, with interest. See, also, *Kauffelt vs. Leber*, 9 Watts & Sargeant, 93. In the case of *Purvis vs. Rayer*, 9 Price, 488, and *Souter vs. Drake*, 2 Barn. & Adolph., 992, (27 E. C. L., 250), it was held that unless there be some stipulation to the contrary, there is in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is as available at law as in equity. It is to be observed, however, that these last were cases of executory contracts. These authorities suffi-

ciently prove that assignments of contracts for the sale of real estate or an interest in it, and executed conveyances of it, are not subject to the same rules of construction.

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The rule that there are no implied covenants on a deed of lands, and that when there are no express covenants, and no fraud, the vendee is without remedy, unless there be some mistake against which the law will relieve, grows out of the character of the instrument, and is not founded upon the nature of the property transferred. The purchaser of land who intends to have recourse in case of eviction against the former proprietor, takes care to have inserted in the instrument of conveyance the necessary covenants for that purpose, thereby ascertaining the precise extent of the liability. If the sale is made upon the understanding that the title is to be at the risk of the grantee, who is to have no remedy in case of defect, express covenants are omitted, and deeds of quit-claim are used. *Frost vs. Raymond*, 2 Caines' R., 188. The price often depends as much upon the nature of the title and form of the conveyance, as the intrinsic value of the land itself, and where there are no covenants, it is presumed that the title is at the risk of the grantee, and that there was a corresponding deduction in price. This is the interpretation which the law puts upon the contract, and unless there is some clearly relievable mistake of fact, the failure of the vendee to protect himself by proper covenants, is regarded as so grossly negligent, that courts will afford no redress, even though the title wholly fails.

This rule, however, applies only to executed contracts for the sale of real estate, and has no reference to those which are executory, upon which relief, on the ground of mistake or failure of consideration, is granted as freely as on contracts concerning personalty.

There are other grounds upon which I am of opinion that the plaintiff is entitled to maintain this action. In every sale of a chattel there is an implied warranty that it exists, and that the vendor has title to it. So, in the assignment of an instrument, even not negotiable, for a full and fair price, I think the assignor impliedly warrants that it is valid, and that the obligor is liable upon it, unless it clearly appear that the

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parties intended to the contrary. This doctrine has long been settled on common law principles, in many of the states of this Union, by courts of the highest respectability and learning, and I perceive no reason to doubt its soundness or justice. In Virginia, *Mackie vs. Davis*, 2 Wash., 219; *Norton vs. Rose*, id., 233; *Caton vs. Lenox*, 6 Rand., 31; *Coiner vs. Hansbarger*, 4 Leigh, 452; *Goodall vs. Stuart*, 2 Hen. & Mun., 105; *Mandeville vs. Riddle*, 1 Cranch, 290; *Yeaton vs. Bank of Alexandria*, 5 id., 49, and *Crawford vs. McDonald*, 2 Hen. & Mun., 189. In Indiana, *Howell vs. Wilson*, 2 Black., 418. In Kentucky, cases above referred to, and *Maupin vs. Compton*, 3 Bibb, 215; 6 Litt., 200. In Mississippi, *Lee vs. Hopkins*, 12 Smedes & Marsh., 299, In New York, *Furniss vs. Ferguson*, 15 N. Y., 437.

I also think that the action could be maintained on the ground of a failure of consideration, by reason of the plaintiff's not having obtained what he bargained for; that the instruments did not answer the description of those which the defendant professed to sell, or the plaintiff to buy. The instruments assigned, though resembling school land certificates, were not such certificates at all. They were mere worthless pieces of paper drawn up in the form of such certificates. The fact that they were signed by the commissioners in their official capacity, can make no difference, so long as they were wholly unauthorized to do so. Their acts in signing and issuing them, under the circumstances, were wholly void, and the certificates, in that respect, were no better than if they had been signed by some other persons and were sheer forgeries, except so far as recovering back the money already paid was concerned. In this respect the case seems to me to fall directly within the principle of the cases of *Young vs. Cole*, 3 Bing., N. C., 724 (32 E. C. L., 302), and *Gompertz vs. Bartlett*, 24 Eng. Law and Eq., 156. The length of this opinion will not allow a recital of the facts of those cases here. It is sufficient to say, that they were both actions between two equally innocent persons, the former as holders of four Guatamala government bonds, the latter of a bill of exchange. All the instruments appeared upon their face to be good,

but were secretly defective; the bonds being such as had theretofore been bought and sold in the London Stock Exchange, were defective in not having been produced by the holders, and stamped by an agent of the government, pursuant to an order of the government, made after their issue, but of which the parties were ignorant; the bill, in having been drawn in England, instead of Sierra Leone, as it purported, and as the parties supposed it to have been. It was held that the plaintiffs, who were assignees, could, after discovery of the defect which rendered the instruments worthless, recover of the defendants, who were assignors, the money paid to them upon an assignment made when both were equally ignorant. TINDALL, C. J., in speaking of the bonds in the former case, says: "It seems, therefore, that the consideration on which the plaintiff paid his money, has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." I think the cases fully sustain the position.

On these two last propositions, however, I have not consulted my brethren, and they are, therefore, given as my own conclusions, and not those of the court.

Although we agree with the circuit judge on the main question involved in the case, still the judgment must be reversed on another point. We think he erred in not allowing the defendant to show that the plaintiff had bought in the original certificates for the lots to which the title failed, at a less sum than the price agreed to be paid by him to the defendant for his interest. In analogy to the rule of damages which obtains in actions for a breach of the covenant of seizin (2 Parsons on Contracts, 498, and cases there cited), and in actions upon executory contracts for the sale of real estate (*Thredgill vs. Pintard*, 12 How., U. S., 24, and authorities there cited by counsel for appellee), where the vendee in possession, has bought in an outstanding or paramount title, we are of opinion that if the plaintiff here has bought in the outstanding certificates, so as to procure a

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good title, for a less sum than the price agreed to be paid to the defendant, he is entitled to have his notes cancelled, and his money refunded, only to the extent of what he has expended in procuring such good title. Therefore, the plaintiff, after deducting one-half of the value of the 60 acres to which he acquired a good title, as compared with the value of the residue, according to the price agreed to be paid for the whole, is entitled to have his notes cancelled, and money refunded; *unless* he has perfected his title by buying in the outstanding certificates, or otherwise, at a rate less than that which he agreed to pay the defendant, in which case he is entitled to have one-half of the sum so paid to perfect his title, deducted from the price which the defendant was to receive, and he is to account to the defendant for the residue or excess.

The judgment of the circuit court is, therefore, reversed, and the cause remanded for further proceedings in accordance with this opinion.

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12	138
81	100
12	138
83	385
12	138
85	561
12	138
89	631
12	138
100	690
12	138
107	162

Where it was stipulated, in a written agreement for a mercantile copartnership, entered into in March, 1838, "that a lot should be purchased for the concern, and a store be erected thereon," it may be shown, by parol evidence, that a lot, afterwards (in the same year) conveyed by absolute deed to one of the partners, and upon which a store was erected, and *used for the partnership business*, was purchased and improved with the partnership means, and is partnership property.

It seems that if the written agreement had not contained any such stipulation, such evidence would have been admissible under the rule of equity then recognized, that a trust in real estate resulted in favor of the party who paid the purchase money therefor.

An agreement for a partnership in dealings in real estate, is within the statute of frauds, and void unless in writing. The fact that the parties making such agreement are engaged at the time in a mercantile partnership, does not take it out of the statute.

Where A, B, C and D, were the members of a mercantile copartnership, and D received conveyances from his *copartners*, by absolute deeds, of divers pieces of real estate, upon which improvements were afterwards made under his direction as ostensible owner, but which were *never used for any of the part-*

nership purposes, it is not competent for his copartners to show that such real estate is partnership property, or held upon any trust for their benefit, by proving a *parol* agreement with D, at the time said conveyances were made, that he should hold said real estate (with other real estate previously owned by him) as partnership property, to be improved by their equal contributions, and should reconvey their undivided shares of said property to them upon request; and that the improvements were made with the means of the partnership, or by the equal contributions of its members; the admission of such evidence being contrary to the statute of frauds.

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Such an agreement, if proved, did not constitute the parties thereto copartners in the real estate thus conveyed. A mere community of interest in land does not make men partners; there must be some joint adventure, and an agreement to share in the profit and loss of the undertaking.

APPEAL from the circuit court for *Dane* county.

This was a suit in equity, commenced in March, 1854, by the complainant *Bird*, for the purpose of dissolving an alleged copartnership between himself and *James Morrison*, *John F. O'Neil* and *James D. Doty*, and for an accounting, and distribution of the partnership effects, &c.

The bill alleges, that on the 19th of March, 1838, the complainant, and said *Morrison*, *O'Neil* and *Doty*, entered into partnership in the mercantile business in Madison, Wisconsin, under a written agreement, which recited that said *Morrison* should be the acting partner, and should conduct the business in the name of "*James Morrison & Co.*;" that the capital stock should be twenty thousand dollars, of which each partner should supply his equal proportion as required; that a stock of merchandize, which said *Morrison* then had at Helena, should be removed to Madison, and received at cost and charges; that said business should be continued until the 1st day of January, 1840, unless sooner dissolved by mutual consent, and "that a lot in said town should be purchased for the concern, and a store and other necessary buildings erected thereon."

The bill also alleged, that in the spring of 1838, in pursuance of said agreement, said partners opened a store of merchandise in said town, each contributing his share to the capital stock from time to time when required, said *Morrison* taking the management thereof, as the acting partner, and "that soon thereafter, in the same year, the said copartners agreed and entered into an arrangement to *extend* the business

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of their said copartnership, so as to embrace dealing in and improvements of certain real estate in said town of Madison, by each of said partners agreeing to contribute and put in, as capital stock for that purpose, an equal share of real estate, consisting of lots in said town, and to contribute an equal amount of means required to improve the same, and more especially for the construction of a hotel and the necessary buildings and improvements connected therewith;" and that during the same year, in accordance with said agreement, and without any other consideration whatever, "the said *James Morrison* and the said *John F. O'Neil* being the joint owners of lots 5, 6 and 7, in block 101, and the said *Doty* and the complainant being the equal joint owners of lot 8, in block 101, and of lots 1, 2 and 3, in block 104, and the said *Doty* being the sole owner of lots 1, 2, 3 and 4, in block 262, all in said town, they (said *Bird*, *O'Neil* and *Doty*) caused the said lots to be deeded to the said *James Morrison* in fee, to be used and treated as the capital stock of said copartnership in real estate, with the understanding and agreement by and between all of said copartners, that the said *James Morrison* should thereafter reconvey to each of the other copartners, his just share of said lots, consisting of an undivided one-fourth of the same, with the improvements thereon, when he, said *Morrison*, should be requested so to do by all or either of said copartners."

The bill also states, that after the conveyance to said *Morrison*, of said lots, the same and the improvements that were being made thereon, were treated ostensibly as the property of said *Morrison* alone, and the business appertaining thereto, ostensibly conducted in his name, and "that said real estate was greatly improved and enhanced in value, by the erection of valuable buildings thereon, by the use of the means and the capital of the said copartnership," the complainant contributing for the use and benefit of said copartnership, in money and personal property and labor, the sum of ten thousand dollars and upwards, "by placing the same in the hands and control of said *Morrison* to be used by him for that purpose."

The bill also alleges, that the copartnership has never been

dissolved; that large profits were made in the said mercantile business, and large rents and incomes have accrued from the said real estate, all of which have been received by said *Morrison*, who, though often requested, has refused to make any settlement of the affairs of said copartnership; that said *Morrison* has conveyed said real estate to one *Dean*, (who is also made a defendant,) without any valuable consideration therefor, and with full notice of the equitable rights of the complainant and *O'Neil* and *Doty* in the same. Prayer, that the partnership be declared dissolved, an account taken of the partnership dealings, and an equitable distribution made of the effects of said copartnership, &c.

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The answer of the defendant *James Morrison*, admits the making of the written agreement referred to in the bill, for a mercantile copartnership between himself, the complainant *Bird*, and said *O'Neil* and *Doty*, but denies that the complainant, *Bird*, ever contributed his share, or any part thereof, in money or otherwise, to the capital stock of said company; and denies also, according to the best of his remembrance, information and belief, that said *O'Neil* and *Doty* ever contributed their share of the capital stock of said company, or any part thereof, in money or otherwise, adding, that if said *O'Neil* and *Doty* "ever did so, and they have not been fully satisfied by the defendant *James Morrison*, the courts of equity are open to them, to have their rights established against him."

The answer further states, that in June, 1838, the said *Morrison* brought to the town of Madison, the stock of merchandise belonging to him at Helena, referred to in the agreement of partnership, and supposing that the complainant, *Bird*, and said *O'Neil* and *Doty*, would, within a reasonable time, pay their respective shares of the cost and charges of said merchandise, so as to constitute the same capital stock of said company, according to the terms of said agreement, commenced business and opened books in said company's name, he, said *Morrison*, being the acting partner; but after waiting for some length of time, the said complainant and *O'Neil* and *Doty* failed entirely to take an account of said stock and pay him their respective shares of the cost and

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charges thereof, although required so to do, and supposing that they had abandoned said agreement, he proceeded thereafter to trade on and dispose of his said merchandise, in his own name and for his own use and benefit.

The answer also expressly denies the agreement alleged in the bill, to *extend* the business of the alleged copartnership "so as to embrace dealing in and improvements of real estate in said town of Madison, by each of said partners agreeing to contribute and put in as capital stock for that purpose, an equal share of real estate, consisting of lots in said town, and to contribute an equal amount of the means required to improve the same."

The answer also expressly denies, that the complainant, *Bird*, and said *O'Neil* and *Doty*, caused the lots described in the bill to be deeded in fee to said *Morrison*, to be used and treated as the capital stock in said copartnership in real estate, with the understanding and agreement by and between all of said copartners, that he should thereafter reconvey to each of them his just share, being an undivided fourth thereof, with the improvements, when requested to do so by all or either of said copartners; and denies that said *O'Neil* and himself were, in 1838, the joint owners of said lots 5, 6 and 7, in block 101, or that said *Doty* and *Bird* were joint owners, in 1838, of said lot 8, in block 101, and said lots 1, 2 and 3, in block 104, or that said *Doty* was the owner of said lots 1, 2, 3 and 4, in block 262, after the 8th day of May, 1838; but on the contrary, alleges, that he, the said *Morrison*, was in 1838, the sole owner of said lot 8, in block 101, and of lots 1, 2 and 3, in block 104, under a deed executed to him for a valuable consideration, by said *Doty*, as the trustee of the Four Lake Company, dated December 1st, 1836, and was also the sole owner of lots 1, 2, 3 and 4, in block 262, under a deed executed to him for a valuable consideration, by said *Doty*, as such trustee, dated May 8th, 1838, all of which property he purchased with his own means, and not otherwise.

The answer admits that said lots have been greatly improved by the erection of valuable buildings thereon, but avers that these improvements were not made with the means

of said copartnership, but with the private means and funds of said defendant *Morrison*, with the exception of between four and five hundred dollars, which the complainant contributed towards building what was known as the American Hotel, on lot 8, in block 101, as a subscriber to a joint stock company for the erection thereof, and alleges that no one having contributed anything towards said building but himself and the complainant, he repaid to the complainant the amount so contributed by him, and received from him a release of all his, the complainant's, title and interest in said lot and building, by deed dated Oct. 5th, 1839. The answer denies that said *Bird* ever paid or furnished any other money, personal property, or labor, for the benefit of said alleged copartnership. The answer admits that no formal dissolution of copartnership between the complainant and *Morrison*, *O'Neil* and *Doty*, was ever declared, because the copartnership never was consummated.

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The answers of *Doty* and *O'Neil* substantially admit all the material allegations of the bill.

The answer of the defendant *Dean*, alleges that he purchased the real estate referred to in the bill for a valuable consideration, without a knowledge of any claim of *Bird*, *Doty* or *O'Neil* to any part thereof, or any notice that said *Morrison* held it in trust for them or either of them.

The complainant filed a general replication to the answers.

On the hearing of the cause, no evidence was offered of any written agreement to extend the alleged partnership between said *Bird*, *Morrison*, *O'Neil* and *Doty*, so as to embrace dealing in and improvement of real estate, or of any written agreement that lots conveyed by either of said parties to *Morrison*, should be used as the capital stock of a copartnership in real estate, but the complainant, who was sworn as a witness, testified, that the agreement between the parties in reference to the alleged partnership in real estate, was a verbal one.

The deeds which *Morrison* held for the real estate referred to, were absolute on their face.

The record contains a large amount of testimony upon the disputed questions of fact, whether the partnership in regard

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to the mercantile business was ever consummated; whether the alleged agreement was made to *extend* the partnership so as to embrace dealing in and improvement of real estate; whether any real estate was conveyed to *Morrison* under such agreement; whether improvements were made thereon with partnership funds; and whether *Dean* purchased the real estate with notice, &c.; but as the evidence is referred to in the opinion of the court, so far as is necessary to an understanding of the legal principles involved, any further statement of it is omitted.

The circuit court found as *facts*, that on the 19th of March, 1838, the complainant *Bird*, and the defendants *Morrison*, *O'Neil* and *Doty*, entered into a copartnership in the mercantile business, under the written agreement set forth in the bill of complaint; that in June of that year, in pursuance of that agreement, the said *Morrison* removed his stock of goods therein referred to, from Helena to said town of Madison, and put them into a store provided by the partners for that purpose, and commenced the mercantile business in the name of *James Morrison & Co.*, he being the acting partner; that each of said partners, at or about the commencement of said copartnership business, contributed towards the capital stock of the same; that said partnership business was carried on under the management of *Morrison* as the acting partner, until some time in the year 1841 or 1842, when the merchandise belonging thereto was entirely sold and disposed of; that "on or about the 8th day of May, 1838, the said partners entered into a *verbal* agreement to extend the business of said copartnership, so as to embrace therein dealings in and improvements of certain real estate, to wit: town lots in said town of Madison, and each of them agreed to put in and contribute for that purpose an equal share of lots in said town, and to contribute equally the means required to improve the same, particularly for the purpose of building a hotel, and the necessary buildings and improvements connected therewith, as alleged in the complaint;" that "in pursuance of said last mentioned agreement, the defendant *James D. Doty*, on the said 8th day of May, caused lots 1, 2, 3 and 4, in block 262, in said town of Madison, to be con-

veyed to said *James Morrison* in fee, for the use and to be treated as a part of the real estate of said copartnership; that during the summer of 1838, the defendant *James Morrison* acquired the title to and became the owner in fee, of lots 5, 6 and 7, in block 101; but whether he owned the same in his own right solely, or for himself and the defendant *O'Neil*, equally, does not appear from the proofs; that on the 13th day of October, 1838, the complainant *Bird*, and the defendant *Doty*, pursuant to said last mentioned agreement, by a deed executed by *Doty*, as trustee of the Four Lake Company, to said *Morrison*, dated the 1st day of December, 1836, but in fact executed, acknowledged and delivered on the said 13th day of October, 1838, caused lot 8, in block 101, and lots 1, 2 and 3, in block 104, as described in the complaint, to be conveyed in fee to the said *Morrison*, to be used and treated as part of the capital stock of said firm; that said complainant *Bird*, and defendant *Doty*, caused said conveyances of said lots to be made to the defendant *James Morrison*, as and for each of their undivided fourth parts of the capital stock of said firm in real estate, to be by each of them contributed, with the understanding on their part, that the defendants *James Morrison* and *John F. O'Neil* were then equal owners of lots 5, 6 and 7, in block 101, described in the complaint, and that the same then became and were to be the property of said copartnership, as the shares put in and contributed by said *Morrison* and *O'Neil*, and with the further understanding and agreement, that the said *James Morrison* should thereafter reconvey to each of said partners his just share of said real estate, consisting of an undivided one-fourth thereof, with the improvements, when he should be requested to do so by said partners; that after the conveyance to said *Morrison* of said real estate, "the same, with the improvements made thereon, remained in the exclusive possession of, was managed by, and treated as the property of said *Morrison*, and the business appertaining thereto conducted ostensibly in his name;" and "that said real estate was improved by the erection of a hotel and other valuable improvements thereon, by use of the means and capital stock of said firm, and the contributions of said partners."

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The court further found as *facts*, that on the 16th of July, 1839, said *James Morrison*, for a valuable consideration, conveyed said lots 5, 6, 7 and 8, in block 101, and lots 1, 2 and 3, in block 104, to one *Lewis Morrison*, who purchased without notice of the rights or interests of said copartners in and to the same, and on the 26th of May, 1851, the defendant *Dean*, with full knowledge of the rights and interest of said partners, purchased said lots from said *Lewis Morrison*, and received a conveyance therefor; that on the 1st day of May, 1851, the said *Dean*, with full notice of the equitable claims of the said *Bird*, *O'Neil* and *Doty*, received from the defendant *James Morrison* a conveyance of said lots 1, 2, 3 and 4, in block 262, by which the legal title thereto was, and still is, vested in him; and that said copartnership has never been dissolved, but remains in full force in respect to the property and effects of said firm.

The conclusions of law announced by the circuit court were: That the defendant *N. W. Dean* is entitled to hold and retain, as his sole property, lots 5, 6, 7 and 8, in block 101, and lots 1, 2 and 3, in block 104, free from all equitable claim on the part of the plaintiff *Bird*, and the defendants *O'Neil* and *Doty*; and that he holds the legal title to lots 1, 2, 3 and 4, in block 262, subject to the equitable claims of said *Bird*, *O'Neil* and *Doty*, and that the same are liable to distribution between the said plaintiff and *O'Neil* and *Doty*, according to their respective interests, as above found and set forth; that said copartnership be dissolved by the judgment of this court; that an account of all the copartnership dealings, business and property, both in the mercantile and real estate business, and of the rents, issues, profits and losses of said business, and of the amounts paid in and drawn out by each of said partners in said business, be taken and stated in the usual manner; that a referee be appointed to take and state such account; that interlocutory judgment be entered in accordance with the said finding of facts and conclusions of law.

The defendants *Morrison* and *Dean* severally filed exceptions to so much of the finding of the court as to facts, and its conclusions of law, as were adverse to their respective in-

terests, and an interlocutory judgment being entered in accordance with such finding of facts and conclusions of law, the said *Morrison* and *Dean* appealed to this court.

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Chauncey Abbott, for appellants, after an argument on the questions of fact involved in the case, said: It remains to enquire and determine what was the character of the alleged agreement between the complainant and *Morrison*, *Doty* and *O'Neil*, relating to the *real estate*, and what is the law by which that agreement, and the testimony offered to prove it, must be governed and controlled.

The case of *Rasdall's Administrators vs. Rasdall*, 9 Wis., 379, fully covers this part of the case, and obviates the necessity of any appeal to other authorities. That case decides: First. That in case of a deed absolute on its face, parol testimony cannot be admitted to prove a trust. Second. That the refusal of the grantee, in a deed absolute upon its face, to apply the property to the purposes verbally agreed upon, between him and the grantor, before or at the time such deed was executed, and an appropriation of such property to his own use, is not in law a fraud, that warrants the admission of parol testimony to establish a trust. Third. Parol testimony can only be allowed where fraud was used in procuring the deed, and that a verbal agreement to use the property in a particular way which the grantee afterwards refuses to comply with, is not such fraud. Fraud in procuring the deed must be alleged and proved. In many particulars the case cited is parallel with the one at bar. In each case it is alleged that the deed was made by mutual agreement and understanding of the parties. No fraud is alleged in procuring the deeds in either case. In each case the trust is denied by the defendant, and in each case sought to be proved by parol testimony. In many respects, that case is much stronger, and goes much farther in excluding parol testimony to establish a trust, than is demanded in this case. Nor is the case at bar relieved in any way by the allegation that the real estate in controversy is partnership property, and put in by the partners as capital stock in the alleged company. The plaintiff offers no testimony which the law can admit, in support of this allegation. This court, in the case above

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referred to, speaking of parol testimony, says: "The law forbids us to be informed that there was a trust, by this kind of testimony." We are not unmindful that it has been held in several states, that real estate, purchased with partnership funds, for partnership purposes, and so used and treated by the partners, will be held to be partnership property, as capital stock, and liable to be treated as personal property. It is not necessary to controvert that position in this case, or to determine whether that rule shall prevail in this court. In all the leading cases on that subject, the controversy was about the rule of law that should prevail, and not about the facts. The question was, admitting that real estate be purchased with partnership funds, used and regarded as partnership property, what character does that impress upon it? Does it go to the administrator or heir? Is the widow entitled to dower?

In the case of *Hoxie vs. Carr*, 1 Sumner's Rep., 173, it was admitted that the property was paid for with partnership funds, and was used for partnership purposes; it was conveyed to the partners as tenants in common; they were a manufacturing company, and the property was a cotton mill. The deed being to the partners as tenants in common, gave rise to the question whether the mill was part of the partnership property. No question about parol testimony arose in the case. The judge remarks, page 188: "And I further agree that as a general rule, a resulting trust cannot arise in contradiction to the terms of the deed. But it does not seem to me that the resulting trust asserted in the present case, is liable to any exceptions on either of these grounds." The deed itself and the written articles of copartnership were the evidence upon which the court based its opinion and judgment in that case. The same is true of all the other cases on this subject. The leading facts, that the property was purchased with partnership funds, and used and treated as partnership property, were either admitted by the pleadings or became a matter of construction on the deeds and other written evidence. This is equally true in the case of *Pierce vs. Trigg's heirs*, 10 Leigh, 406; *Burnside vs. Merrick*, 4 Met., 537; *Howard vs. Priest*, 5 Met., 582; and *Sigourney vs. Munn*,

7 Conn., 11. The rule of evidence as to permitting parol testimony to establish a trust or vary the terms of a deed, is the same, whether the parties be partners or not. The rule of evidence cannot be changed, and the the statute of fraud evaded, by an allegation and proof of a partnership. If the evidence of the alleged agreement relating to real estate rests in parol, it is within the statute of frauds, and the agreement cannot be enforced.

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A. D. Smith and J. G. Knapp, for the respondent, Bird:

A. L. Collins for Doty, and Ryan & Crawford for O'Neil:

The appellants have excepted to both the finding of the facts and the conclusions of law. So far as the exceptions to the findings of fact are concerned, they cannot avail the appellants, because they did not move for a new trial. *Hutchinson vs. Eaton*, 9 Wis., 226; *Davis vs. Judd*, 11 Wis., 11; *Hayward vs. Ormsbee*, id., 3. So far as the store and lot for the place of business of the copartnership is, or was concerned, it was provided for in the articles of agreement, and whether the title was in *Morrison* or not, when procured, it was partnership property, and must be treated according to the law regulating partnerships, as assets of the partnership. Coll. on Partnership, § 135, and notes; *Dyer vs. Clark*, 5 Met., 562; *Howard vs. Priest*, 5 id., 582; *Sigourney vs. Munn*, 7 Conn., 11; *Pierce vs. Trigg's heirs*, 10 Leigh, 406; Story's Eq. Jur., §§ 252, 256, 674, 768 and 1265; *Phillips vs. Phillips*, 1 Mylne & Keene, 649; *Broom vs. Broom*, 3 id., 443; *Hoxie vs. Carr*, 1 Sumner, 173; *Houghton vs. Houghton*, 11 Sim., 491; 3 Kent (4th edition), 36-39. Story's Eq. Jur., §§ 674, 675, 1207; Cary on Part., 27, 28.

The defendant *Morrison* cannot object to testimony in this case, "because it tends to establish an interest in lands by parol." The complainant has no occasion to rely upon parol agreements simply, to take the case out of the statute of frauds. The relation between the parties gives character to their transactions, and raises up out of their transactions, such a trust as no statute of frauds can put down, but just such a trust as courts of equity always enforce when appealed to. *Jenkins vs. Eldredge*, 3 Story's C. C. Rep., 181; Story's Eq. Jur., §§ 1207, 980.

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We might safely admit the doctrine, that no trust resting in parol, can be set up in *opposition* to the deeds to *Morrison*, which are absolute on their face. The trust, we claim, grew out of the relations of the parties, and is clearly deducible from the nature of the business and enterprise in which they were engaged; and the placing of the title in *Morrison* was entirely consistent with the relations and business of the parties. 3 Story C. C. Rep. 288.

If the trust in *Morrison* was a naked trust simply, to be established by his parol declaration or promise to convey to the plaintiff and the defendants *Doty* and *O'Neil*, the case would stand on entirely different grounds. But it is a trust coupled with an interest—*Morrison* holding as well for *himself* as for *Bird*, *Doty* and *O'Neil*; a trust not to be established by proof of *Morrison's* parol agreement to convey, or his parol declaration of trust, but an implied or resulting trust, not within the statute of frauds; a trust not simply *deducible* from the relations of the parties, and the circumstances attending the conveyances to *Morrison*, but actually *forced* upon the mind on viewing the relations of the parties and their business transactions. *Jenkins vs. Eldredge, supra*, 286-9; Story's Eq. Jur. § 980. The relation of the parties before the conveyance to *Morrison*, supplied the contract to hold in trust, &c., and makes this a part of the original undertaking partly performed, and wholly so as to *Bird*, &c., by their several conveyances to *Morrison*.

The statute of frauds does not apply to resulting or implied trusts, and cannot be made to reach the case at bar. Story's Eq. Jur. §§ 674, 972, 980, 1198.

The whole of the property and real estate mentioned in the bill of complaint, was partnership property, and held, used and treated as such by *Morrison*, as well as by *Bird* and the others. It can make no difference in law or in equity, whether the property was put into the concern by the individual partners as capital stock, or was purchased with money contributed by the partners, as capital stock for company uses and purposes. If the former was in effect the transaction in this case, and the title was placed in *Morrison* accordingly, a trust *resulted* in favor of the

partners, and *resulting* trusts and implied trusts are not affected by the statute of frauds. Story's Eq. Jur. §§ 674, 972-980, 1198; Co. Litt., 290 b, Butler's Notes § 8; Bac. Abr. Trusts (C); *Lamplugh vs. Lamplugh*, Pr. Wms., 112, 113. June Term,
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In cases of resulting and implied trusts, the law raises the promise or declaration of trust, for the very reason that there is no express trust created by writing, and this promise or trust must be supported by the situation and circumstances of the parties to be affected by it. And these relations and circumstances may be established by parol evidence or otherwise. *Goodwin vs. Gilbert*, 9 Mass., 510; *Jackson vs. Matsdorf, &c.*, 11 Johns, 91; *Jackson vs. Sternbergh*, 1 Johns. Cas., 153; *Foot vs. Colvin*, 3 Johns., 216; *Jackson ex dem. Whitlock vs. Mills*, 13 Johns., 463.

By the Court, PAINE, J. We think the court below properly found the existence of the original agreement of partnership set forth in the complaint. The answer of the defendant *Morrison*, admitting the execution of the agreement, and that, in pursuance of it, he brought his stock of goods to Madison, and opened the store, as the acting partner, and opened books in the name of the company, establishes this branch of the plaintiff's case in the first instance, and devolves upon *Morrison* the burden of showing that such partnership ceased after having been so entered upon. His counsel insist that it was abandoned in fact, without ever having been entered upon at all. But we do not think this position is sustained, either by his answer or by the evidence. The answer itself only asserts, on information and belief, that *Doty* and *O'Neil* had never contributed their shares of the capital, or any part thereof, and then adds, that if they had done so, and had not been satisfied by said *Morrison*, "the courts of equity were open to them," &c. This kind of denial is not calculated to free the mind from a suspicion that the party denying had quite a distinct impression that the fact might possibly be otherwise. And it does not go far to support the theory that the partnership agreement was abandoned. The evidence also, though not

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of the clearest or most satisfactory character, goes to show that it was continued and not abandoned. The testimony of Seymour is positive, that quite a large amount of goods belonging to *Bird*, were put into the store. After the business had been conducted for a considerable time, *Morrison* still gave receipts in the name of *Morrison & Co.* Goods came to the store marked in their name. It is true, there are some circumstances apparently conflicting with either theory of the case. Thus it is somewhat singular that *Bird*, *Doty* and *O'Neil* should have so long remained silent, without calling for an account, or inquiring particularly into the progress or success of the enterprise. This may perhaps be explained by the relation in which they stood to the building of the capitol, and the fact that workmen were paid out of the store. On the other hand, there is no evidence that *Morrison* ever called on either of the other parties to contribute anything, or ever made any inquiries why they did not, or whether they proposed to abide by the agreement as made. And this is about as singular as their course. The probability is, that the parties were not very desirous of giving publicity to their connection, and that this is to account for an absence of much on both sides that would otherwise be expected. But the making of the agreement being explicitly admitted, as also the fact that it was entered upon, we think the answer fails to show that it was abandoned, and that the evidence shows such a continuation of it, as entitles the plaintiff to an account, as to the mercantile partnership provided for by the written agreement.

But the most difficult question in the case grows out of the alleged subsequent agreement, by parol, to extend the partnership to dealing in real estate, and the allegation that, in pursuance of it, the other partners conveyed to *Morrison* divers lots by absolute deeds, upon an understanding that he was to hold them in trust for the partnership, and to reconvey to each his interest when required. The question at once arises, whether this agreement is not within the statute of frauds.

In the case of *Rasdall's Administrators vs. Rasdall*, decided at the last term, (9 Wis., 379,) we held that parol evidence

was inadmissible to establish an express trust in land conveyed by an absolute deed. And the appellants' counsel contend that this case depends on the same principle and must be governed by that decision. We are unable to see why this result does not follow, unless, as claimed on the other side, the fact that there was a partnership here, makes the case an exception and takes it out of the statute. We have carefully examined the authorities cited, and such others as we could find upon the subject, and we do not think they go to that extent. It is only held that where real estate is purchased by partners with partnership funds, for partnership purposes, it is subject to an implied trust in favor of the partnership debts, including those due the individual partners, and this whether the title be taken to the partners jointly, so that they would at law be tenants in common, or whether it be taken in the name of a part only. Story Eq. Jur., § 1207, and cases cited in note 2; *Coder vs. Huling*, 27 Penn. St., 84; *Matlock vs. Matlock*, 5 Ind., 408; *Dyer vs. Clark*, 5 Met., 562; *Fall River Whaling Co. and others vs. Borden*, 10 Cush., 458.

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These cases and those mentioned in them, are of two classes; those where the real estate was purchased with partnership funds, and those where the parties, by their written agreements, had clearly established the partnership character of the land in question. So far as the first class is concerned, we can see nothing more in the doctrine they hold, than an application of the ordinary rule respecting implied or resulting trusts. That rule is, that a trust results in favor of the party who pays the consideration. Therefore, where a partnership pays the consideration, a trust results in favor of that. But those trusts are not within the statute, and therefore no question arose under it.

In the other class of cases, there was no dispute as to the partnership character of the real estate. In most of them the parties owned it jointly, so that there was no question as to the title. And in such cases, the courts have held that it was to be treated as partnership property, so far as the payment of the debts of the partnership was concerned, though for other purposes it was governed by the rules ordinarily

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applicable to real estate. *Cookson vs. Cookson*, 8 Sim., 529 ; *Peck vs. Fisher*, 7 Cush., 386. The question was not under the statute of frauds, but simply how far real estate owned by a partnership was to be regarded as personal property, and how far it was to be treated as other real estate held by joint title. Thus it will be seen in the case in 10 Cushing, before cited, that the court explicitly states, that "there is no question between competing claimants of the land as land, and of course no controversy as to title, or as to the relations of the statute of frauds to any collision of interest in real estate." It is true, the court had before remarked, that "the relation of the subject to the statute of frauds" was the "straining point in law of the whole inquiry." But the point then under consideration was, whether the partnership could be proved by parol, so as to attach to the real estate the character of partnership property, the actual condition of the title being entirely consistent therewith. Now it appeared in the case, that the "cost of the purchase went into the partnership accounts, that the estates were entered in the company books as company property, and that as portions were sold for profit from time to time, the proceeds were merged in the general funds of the copartnership." I am unable, therefore, to see any substantial distinction, so far as the question of the statute of frauds is concerned, between this case and that of *Dyer vs. Clark*. The title being joint, the fact of partnership may be proved by parol, and that the parties acquired the property as partners and treated it as such, and then, upon these facts, the law attaches to it the character of partnership property, and implies whatever trusts that character requires. And if we properly understand the cases that have sanctioned the admissibility of parol evidence of partnership, to attach to real estate a trust character in favor of the firm, it has been placed upon the ground of implied trusts, so that it was without the statute of frauds. Yet this case in Cushing seems to leave it uncertain, whether it was assumed to be within the statute, and the written evidence sufficient, or without the statute, and no written evidence necessary. It does not state very clearly any definite rule upon which it proceeds, but we do not understand it as

an authority to go further than this, that where the title to real estate is entirely consistent with the fact that it is held as partnership property, the fact that it was acquired as such, and was so held, may be shown by parol to give it that character.

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There is still another class of cases which establish the proposition that real estate may be regarded as an incident to a trading or manufacturing business, and that a partnership in the business being shown, the law implies that the one holding the legal title to such real estate, holds it in trust for the partners. Some instances of this kind are given in the case in 10 Cushing. The case of *Forster vs. Hale*, 5 Vesey, 308, is of the same character. The Lord Chancellor said that the partnership in carrying on the colliery being proved as a fact, the lease of the land was an incident to the business, and although the title was in one, there would be a resulting trust in favor of the partners.

These cases, therefore, go no further than to establish three propositions:

1. Where real estate is bought with partnership funds for partnership purposes, there is a resulting trust in favor of the partnership, though the title be taken in the name of one.

2. Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law will imply its partnership character, and such trusts as result therefrom.

3. A partnership in any branch of trade or business may be shown by parol as an existing fact, and then, whatever real estate is held for the purpose of such business, is regarded as an incident thereto, and the law will imply a trust in favor of the partnership where the legal title is not in all.

Now, without examining whether any of these propositions stand among the many successful invasions upon this statute, it is obvious that none of them goes to the extent of saying, that a bald parol agreement for a partnership in real estate as such, may be shown, to create a trust in land held

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by one of the parties, under a deed absolute on its face. Nor do we think that such is the law. We have found only one case that affords any sanction for such an idea, which is that of *Dale vs. Hamilton*, 5 Hare, 269. But it was the opinion only of the Vice-Chancellor, and he admits, virtually, that his decision would be a repeal of the statute. He says, "When the proposition was first advanced by the plaintiff, I confess it appeared to me that to admit the agreement to the extent contended for, would virtually be to repeal the statute of frauds, or nearly so; for if a party, by alleging an interest in land of any specific kind, can escape from that safe-guard against fraud and perjury which the statute has provided, it remains only that those who are prepared by fraud and perjury to invade the rights of another, shall make that specific interest (to which, it is said, the act does not extend) the ground of their claim, and the statute is at once evaded. Thus, if A alleges that B agreed to give him an interest in land, the statute applies; but if he adds that the land was to be improved and resold at their joint risk, for profit and loss, the statute does not apply."

This brief extract clearly exposes the fallacy of the proposition; and yet the Vice-Chancellor went on to sustain it, upon the ground of authority. But we do not think any that he cited support the doctrine, or go further than those we have before alluded to. On the other hand, there is an elaborate opinion by Judge STORY, in *Smith vs. Burnham*, 3 Sum., 435, in which he holds such an agreement to be clearly within the statute of frauds and void. See also Collyer on Partnership, § 3, note; *Henderson vs. Hudson*, 1 Mun., 510. If the authorities, therefore, were equally divided upon the point, we should be inclined to follow those which uphold the law, rather than such as admit that they repeal it, for we are unable to understand by what authority courts can repeal a statute.

And what safety would there be, if the proposition were once established, that by alleging a partnership, the statute of frauds is entirely avoided, and the parties may then prove whatever interest in land they please by parol, against the absolute title of the deeds? What would hinder the separ-

ate real estate of any partner from being converted into partnership property, by proof of a mere verbal agreement?

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What would hinder the absolute title of any man, whether partner or not, from being changed into a trust estate in the same way? Nothing whatever. For the statute assumed that there were those ready, as the Vice-Chancellor said, to invade the right of others by fraud and perjury. Let it be known, then, that a partnership avoids the statute, and all that would be necessary would be for the fraud and perjury to establish that also, and then every title would be open to attack. We do not feel called upon, even if we had authority, to overturn a statute for the purpose of exposing the title to real estate to such uncertainties. It may be urged, that the same evils may, to a certain extent, result from the rules before referred to in regard to implied trusts in favor of partnerships. But the facilities for fraud are not half so great under them. They require proof of the partnership as an actual existing fact—a partnership doing business, having property and using it; and it is not so easy to establish this by false evidence, as it is to show a mere verbal agreement. And it may be remarked, that even the doctrine concerning resulting trusts, could not, perhaps, prevail as the law now is in this state, it having been very materially modified by statute.

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We are of opinion, therefore, that even if the allegations in the complaint, respecting the subsequent agreement as to dealings in real estate, should be held to show a partnership, yet the absolute title of *Morrison*, under his deeds, could not be changed into a trust estate by virtue of such verbal agreement. But although this point was not made upon the argument, we are satisfied that the allegations of the bill are not sufficient to show a partnership in respect to any of the real estate, except such as was acquired for the store. True, it alleges that the partnership was extended to dealing in real estate, but it then proceeds to state, specifically, what such dealing was to consist in, and what was the actual agreement with respect to the lots conveyed by the other partners to *Morrison*. And these specific allegations must control the general words, and if they do not show a part-

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nership, then none is averred. The mode, then, by which this partnership in real estate was to be established, was, according to the complaint, as follows: "By each of said partners agreeing to contribute and put in, as capital stock for that purpose, an equal share of real estate, consisting of town lots in said town of Madison, and to contribute an equal amount of means required to improve the same, and more especially for the construction of a hotel, and the necessary buildings and improvements connected therewith." Then, after averring that the other partners did accordingly convey to *Morrison* certain lots in fee, "as the capital stock of said copartnership in real estate," it proceeds to allege that it was "with the understanding and agreement, by and between all of said copartners, that the said *James Morrison* should thereafter reconvey to each of the other three copartners, his just share of said lots and real estate, consisting of an undivided one-fourth of said lots, with the improvements thereon, when he, the said *Morrison*, should be requested so to do, by all or either of the copartners."

Now, what constitutes this a copartnership? We are unable to perceive. Standing alone, it is nothing more than a conveyance of certain lots by three persons to another, with an understanding that they were to be jointly improved, and he was then to reconvey to each his share. The element of risk, and of profit and loss in conducting the business, is lacking. For a joint interest in the increase of value of real estate, either by its rise, or by improvements put on by parties jointly owning it, does not constitute a partnership. Otherwise all joint owners would become partners, for they are always jointly interested in the profit of increased value as well as in the loss by depreciation. But, to make a partnership, there must be a dealing in the article for the purpose of making profit from the dealing, and that is not provided for here.

It may be admitted that dealing in real estate may be the proper subject of a copartnership agreement, though this has sometimes been held otherwise. *Coles vs. Coles*, 15 Johns., 159; *Baker vs. Wheeler*, 8 Wend., 505. It was there held that the title to real estate was of such a nature as prevented the

application to that kind of property, of the rules of law applicable to partnership property. And as we have already seen, the joint acquisition by partners of real estate, with partnership funds and for partnership purposes, vests in them the title as tenants in common at law, and it is only by going into equity that it is made subject to the implied trust as partnership property. But it seems to be now established, that real estate may be alone the subject of a copartnership. This point is considered in the case in 10 Cush., before cited, and in Collyer on Part., § 51, note 1. But to make it a partnership, there must be a dealing from which profit or loss may arise. Thus if the rule is as stated in *Brady vs. Colhoun*, 1 Penn., 140, that "a partnership in land may be limited to the purchasing only, the profit and loss being divisible as stock," this case does not come up to that, for here there was no purchasing, the agreement relating to lands which the parties then had. In the case of *Ludlow vs. Cooper*, 4 Ohio State Rep., this question arose. The court, after alluding to the rule where real estate is bought with partnership funds, and used for carrying on partnership business, proceeds as follows: "In the case now under consideration, however, the entries were not made with partnership funds, nor were the lands to be used as a *means* of carrying on any partnership business, other than the purchase and sale of real estate. It is very clear that although the land was not purchased with partnership funds, but was to be purchased with separate funds of *Cooper* and *Ludlow* in equal portions, the property was to be considered partnership property, so far as real estate could be so considered and treated; that it was, by the agreement, to be *sold* and *converted into money*, and each partner to share and share alike in the profits, and of course to share in the losses." And upon this ground, that by the agreement, which was in writing, the property was to be sold, and they were to share in the proceeds, the court held it a partnership. And the implication is that except for that, they would have held otherwise. If the bill had alleged that the partnership extended to the carrying on of the hotel business, that would have been a partnership, and might, so far as the hotel lots were concerned, have laid

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the foundation for applying the doctrine of implied trust to the real estate used for the hotel, as being incident to the business. But it only alleges that they were to build a hotel. And this does not make it a partnership more than it would if they had built a boarding house or a mill. In *Sikes vs. Work*, 6 Gray, 433, the parties had purchased a lot jointly, and one had built a boarding house on it, with the consent of the other. They did not at the time contemplate going into business in it, but did actually form a partnership in keeping a boarding house, which was conducted for three years. The court said: "The evidence in this case fails to show a partnership in regard to the real estate owned by the parties. There was no agreement between them to share the profit and loss of the joint undertaking, which is the essential and distinguishing feature of the contract of copartnership."

Neither does the agreement to share equally the expense of building the improvements make it a partnership. In *Noyes vs. Cushman*, 25 Vt., 390, the defendants had purchased a grist mill and privilege, under an agreement to rebuild it and share the expense equally. The court said: "Their mutual obligation to rebuild and repair does not necessarily constitute them partners, for, as observed by Judge Bronson, in *Porter vs. McLure*, 15 Wend., 187, 'they may or may not become partners in carrying on the milling business.' A mere community of interest in real or personal estate, does not constitute a partnership. But where a purchase of that character is made, and the premises are rebuilt or repaired for the purpose of prosecuting some joint enterprise or adventure, under an agreement to share in the profit and loss of the undertaking, the contract then becomes one constituting a partnership."

In the case alluded to in 15 Wend., the defendants owned a mill-site and had contracted for the erection of a mill. The court said: "The mill when completed, like the site which it occupied, would be real estate, and the defendants would hold it by the same tenure by which they held the land. Whatever that tenure might be, it would not constitute them partners; they might or might not become part-

ners in carrying on the milling business. A community of interest in land does not make men partners, nor does a mere community of interest in personal property. There must be some joint adventure, and an agreement to share in the profit and loss of the undertaking."

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Upon all these authorities, we think there was no partnership in the real estate, even according to the facts alleged in the bill. It seems to have been nothing more than an agreement to convey the title to certain lots owned by the three, to *Morrison*; they were then to put certain improvements upon them, and upon those which *Morrison* was to put in, and then he was to convey to each of the others an undivided fourth part, on request. There was to be no purchasing of lands, no sale, nothing in which they were to share the profit and loss. The complaint excludes all idea that there was to be any sale of these lands for the purposes of profit. For if such was the case, then all the allegations in respect to the purchase by *Dean*, and his notice, &c., are out of place. For if the property was partnership property, and the title was placed in *Morrison* for the purpose of dealing with it as such, then he could sell the whole interest; and though the purchaser had notice of such partnership he would undoubtedly take a good title. But the bill was framed upon the theory that there was to be no sale, but that the parties were to retain their respective interests, and have them reconveyed. There can be no doubt that this agreement respecting the real estate, standing alone, would not amount to a partnership. Does the fact that the parties were engaged in a mercantile partnership give it any different effect? We are unable to see that it does. For certainly it cannot be said that wherever a partnership exists, that changes the law with respect to agreements made by its members about real estate outside of that partnership. We have already seen that a partnership may be made the ground of implying certain trusts in real estate used in the business, or acquired with its funds. But this furnishes no reason for saying that where the members of a partnership make an agreement with respect to real estate which they own separately, the law applicable to such agree-

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Our conclusions may be thus stated: An agreement for a partnership to consist in dealings in real estate, is within the statute of frauds, and void unless in writing.

The fact that the parties making it are engaged at the time

in a mercantile partnership, does not take it out of the statute. The alleged new agreement in respect to the real estate does not in law constitute a partnership therein, and the existing mercantile partnership does not give it that effect.

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The case, therefore, with respect to this real estate, stands upon the same footing as the *Rasdall* case, and is an attempt to show by parol an express trust in lands conveyed by deeds absolute on their face. We must hold such evidence inadmissible under the statute of frauds. The lot acquired for the store was clearly trust property. It would be so as incident to the mercantile business, within some authorities, but it is not necessary to rely on that doctrine here, for the original agreement expressly provided for its purchase. *Morrison* will, of course, be liable to account for the proceeds of that, it having passed to *Dean* through a *bona fide* purchaser without notice, and for any part of the partnership funds or property which he may have applied to the improvement of real estate to which he had the title, as well as for the shares of the others in the mercantile business, and the profits, &c.

It follows, therefore, that the decree must be affirmed so far as it adjudges the existence of the mercantile partnership, and an account between the parties therein; and that it must be reversed so far as it adjudges a partnership in real estate, other than the store lot, and an account of such partnership; and also all that part of the decree from which the defendant *Dean* has appealed, is reversed. The order for reference will remain, but the accounting will extend only to the mercantile partnership.

DIXON, C. J., did not sit in this case, having presided at the trial in the circuit court.

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77	556
12	163
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In an action by a lessor to enjoin the removal of a wooden building from a demised lot, situate in the city of Milwaukee, it appeared that the lot was unimproved at the date of the lease; that the building was erected by the lessee

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so as to be capable of removal without injury to the freehold, and that at the date of the lease and for several years before, a general custom prevailed in said city, that tenants leasing naked ground and making improvements thereon, might, in the absence of any restriction in the lease, remove such improvements at or before the expiration of the term: *Held*, that the lease in this case being silent on the subject, the parties must be presumed to have contracted with reference to the custom, and that the lessee had a right to remove the building at any time before the expiration of his term.

A stipulation in the lease, that the rent should be paid, "except in case of the destruction of the premises by accidental fire," and that the tenant should deliver up the premises at the end of the term, "use and wear thereof, and damage by accidental fire, &c., only excepted," is not regarded as being inconsistent with said usage, or as showing an intention of the parties to make a contract variant therefrom, especially as in drawing the lease, the parties used a printed form in general use, in which the stipulation referred to occurred, and the rent is of the small amount which would probably be paid for a lease of the ground.

The lease in this case contained a covenant that the lessee would not assign it without the lessor's consent, and a stipulation that on breach of any of his covenants, the lessee should forfeit all right and title to the demised premises, and the lessor *might* re-enter and expel him therefrom; and it appeared that the lessee had assigned the lease to the defendant and given him a mortgage on the building, without consent of the lessor, but the defendant was in possession of the premises at the commencement of the suit, claiming to hold under the lease, and there was no proof that the lessor had made a re-entry into the premises, or taken any steps to claim or enforce a forfeiture before bringing suit: *Held*, that the term had not expired, and the right to remove the building remained.

APPEAL from the Circuit Court for *Milwaukee* County.

This was an action to enjoin *Daniell*, the appellant, from selling or removing a wooden dwelling house from a lot in the city of Milwaukee. The complaint, which was filed on the 29th of September, 1859, stated that on the 1st day of February, 1857, the plaintiff, by his guardian, *Thomas Keogh*, of the city of Milwaukee, executed to one John B. Weld, of the same city, a lease of the lot referred to, for the term of six years from that date, at a rent of twenty-five dollars a year, to be paid in quarterly instalments during said term, "except in case of the destruction of said premises by accidental fire;" with covenants, on the part of the lessee, not to assign or under-let the premises, nor otherwise part with said lease, without the written consent of the lessor, and to deliver up said premises at the end of the term, "reasonable use and wear thereof, and damage by accidental fire, or other accidents not happening through the neglect of the lessee, only excepted," with a stipulation, that if default should be

made by the lessee in the performance of any of his covenants, he should forfeit all title to the demised premises, and it should be *lawful* for the lessor to re-enter the same, and expel the lessee therefrom. The complaint further stated, that the lessee had broken his covenants, by neglecting and refusing to pay the rent for two quarters next before the commencement of the suit, and by leasing said premises to said *Daniell*, without the consent of the lessor, and also, that said *Daniell* had advertised to sell the building on said premises, by virtue of a chattel mortgage, alleged to have been executed to him by said *Weld*, and to remove the same from the premises. Prayer, for a perpetual injunction and for general relief.

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Upon the filing of the complaint, the circuit court, on the *ex parte* application of the plaintiff, made an order restraining the said *Daniell* from selling or removing the dwelling house, situate on the lot referred to, until the further order of the court.

The answer of *Daniell* denies that the lease delivered to *Weld* contained a covenant not to assign or under-let the premises without the consent of the lessor, but avers, that in drawing said lease, a printed form with blanks was used, and that the portion of the printed form containing that covenant was erased before the execution of the lease. It also denies that *Weld* had broken any of the covenants in said lease, and avers that all the rent which had fallen due thereon, had been paid or tendered to the plaintiff before the commencement of the suit, and that the plaintiff had refused to receive the rent for the last two quarters. It further states, that at the date of the lease, there was no building on the demised premises; that the dwelling house referred to was built by said *Weld*, and is not a permanent structure so attached to the freehold as to be inseparable therefrom, but is a light wooden building, placed on the said lot with reference to, and for the purpose of, a temporary occupation and subsequent removal, and is so constructed as to be capable of being easily removed, without injury to the freehold. It also avers, that there is a common or usual custom, which has generally for a long time prevailed, and

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still generally prevails, in the city of Milwaukee, by which lessees erect upon ground leased for a term of years, dwelling houses for their occupation during the term, and remove the same at their pleasure, at or before the expiration of such term.

The answer further states, that before the commencement of this suit, said Weld had executed to *Daniell* a chattel mortgage upon said dwelling house, and had assigned to him the said lease, as security for a loan of money, and that the said *Daniell* had taken possession of said house, by virtue of said mortgage, for the purpose of selling the same, to make the amount of said loan, in pursuance of a power contained in the mortgage. The answer further states, that said *Daniell* had taken possession of said lot, under said lease, and the assignment thereof, and avers that the plaintiff had given no notice of the termination of said lease, or of his intention to terminate the same, by reason of any of the alleged breaches of the covenants therein, and that the plaintiff had not demanded possession of said premises, or taken any steps to resume possession thereof. The answer also contained an offer to pay the rent which was in arrear.

After the filing of the answer, a rule to show cause why the injunctional order which had been granted, should not be dissolved, was submitted upon the complaint and answer, and upon the following proofs:

1st. The affidavits of Ephraim Mariner and Joshua Hathaway, who testified that there was a common and prevailing custom, at the time of the execution of the lease in this case, and for several years before, in the city of Milwaukee, that tenants, taking leases upon unimproved lots, and making improvements thereon, might remove their improvements at or before the expiration of the term, though no provision were made in the leases for such removal.

2d. The note of Weld in favor of *Daniell*, for eight hundred dollars and interest, due September 15th, 1859, and a mortgage executed to him by Weld, upon the building referred to in the complaint, with power to the mortgagee to take possession of said property and sell the same, in case of the non-payment of said note at maturity.

3d. The affidavit of *Thomas Keogh*, presented by the plaintiff's counsel, and sworn to October 21st, 1859, which states that the lease described in the complaint did contain a covenant on the part of the lessee, not to assign or underlet the demised premises, or otherwise part with the lease, or the premises leased or any part thereof, without the written consent of the lessor; that said covenant was not erased before the execution of said lease, and has not since been changed by erasure or otherwise, with his consent; that on the first day of August, 1859, the sum of twelve dollars and fifty cents became due to the plaintiff from said Weld, for the rent of two quarters, and that Weld has never paid or tendered the same, and that said *Daniell* had not tendered any part of said rent on behalf of said Weld; that since the said first of August, said *Daniell* called on the deponent, and offered to pay the sum due for rent, but when asked as to his authority to make payment in behalf of Weld, he produced said lease, which he claimed had been assigned to him, and under which he made the tender as tenant, and the deponent refused to receive the money thus tendered, through fear of recognizing *Daniell* as his tenant; and that he has, since the first of August, given notice of his intention to terminate the lease, by delivering to one Wilkins, the person then in possession of the premises, a written notice to quit, and by demanding of said Wilkins the keys of said dwelling house.

The circuit court, upon the hearing of the rule to show cause, refused to dissolve the temporary injunction, and made an order discharging said rule, with costs, from which decision and order said *Daniell*, having duly excepted thereto, appealed to this court.

Waldo, Ody & Van, for appellant:

The term of the tenant was not expired. It is only averred in the complaint that a cause of forfeiture has occurred, but not that a forfeiture has been adjudged, nor even that the plaintiff had elected to forfeit the lease. It is proved by the defendant that the back rent had been tendered and refused, and the defendant is still in possession. It was the general custom at Milwaukee at and for many years before the date of this lease, to give ground leases of vacant lots,

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and to allow the tenant, at his pleasure, to remove such buildings as he should erect thereon, without any special agreement. This custom is sufficient to establish the right to make such removal. *Woodfall's L. & Ten.*, 219; *Van Ness vs. Pacard*, 2 Peters, 148; *Taylor's L. & Ten.*, §§ 538, 540, 542, 549, 554, and cases cited in the notes. The house can be readily removed without injury to the freehold. The rule of law now is, that a tenant for a limited term, who makes improvements for ornament, domestic convenience, or to carry on trade, may at any time before his term expires, rightfully remove such improvements, when it can be done without material injury to the inheritance. *Taylor's L. & Ten.*, §§ 544, 546, 547, 548; 2 Peters, 140; 7 Barb., (S. C.), 263; 4 Pick., 310.

In cases between landlord and tenant, the rule is more liberal to the tenant than that applied in cases between grantor and grantee of the fee, or between heir and executor. *Walker vs. Sherman*, 20 Wend., 636. The tenant may make the removal at any time before he surrenders the possession of the premises. *Taylor's L. & Ten.*, § 551; *Penton vs. Robart*, 2 East, 88; *Davis vs. Jones*, 2 B. & A., 165; *Weston vs. Woodcock*, 7 M. & W., 18; *Ellis vs. Paige*, 1 Pick., 43, 49; *White vs. Arndt*, 1 Whart., 91. If the thing in question is so constructed as not to become affixed to the land, it is a mere chattel, and cannot be treated as a fixture. *Taylor's L. & Ten.*, § 548; *Van Ness vs. Pacard*, *supra*; *Walker vs. Sherman*, 20 Wend., 536, 657. Movable fixtures may be sold on execution against the tenant, or he may sell or mortgage them, and on his death they go to his personal representatives. *Taylor's L. & Ten.*, § 549. *Reynolds vs. Shuler*, 5 Cow., 323, 327.

The proper test is, "could this property be removed without any injury to the freehold?" 3 McCord, 353; 9 Conn., 63; 20 Wend., 640; 14 Mass., 352.

Coon & Cotton, for respondent:

The order in this case does not decide whether the plaintiff shall be entitled to a permanent injunction, but only retains the temporary injunction till the final decision of the action. Where the defendant, in his answer to an injunc-

tion bill, admits the equity of the bill, but sets up new matter of defense, the injunction will be continued to the hearing. 1 Barb. Ch. Pr., 610, and cases there cited. That is precisely this case. If the defendant had demurred to the bill for want of equity, and then moved to dissolve, it would have presented another case; but he sets up new matter of defense by way of answer, and affidavits, all of which we must have an opportunity to contest on the trial. There was probable cause to continue the temporary injunction till the final determination of the case, because: 1st. From the terms of the lease, and the facts, even as they now appear, and without any forfeiture by the lessee, neither the assignee of the lease, nor the lessee himself, had any power to remove the building. The tenant covenants to pay the rent, except "in case of the destruction of the said premises by accidental fire," and "to quit and deliver up said premises" to the plaintiff at the end of the term, "reasonable use and wear thereof, and damage by accidental fire, or other accidents not happening through the neglect of the tenant, only excepted." As no damage could happen by fire to the lot, these words must refer to the building to be subsequently erected, which was therefore a part of the "premises" which he was to deliver up at the termination of the lease. 2d. All the decisions agree that whatever fixtures the tenant has a right to remove must be removed before his term expires. Taylor's L. and Ten., § 551, and cases cited. In this case his term had expired by forfeiture before the action. He failed in his covenant to pay the rent, and the same has been demanded and payment refused. This is positively sworn to in the complaint, and though denied by the answer, we may establish it by proof on the trial. He has violated the covenant that he would "not assign or underlet the premises, or otherwise part with the lease," without the written consent of the lessor. The answer admits that the defendant has taken possession of the lot by virtue of said lease and the assignment thereof to him. It is stipulated in the lease, that upon a breach of any of his covenants, the lessee shall forfeit all right to the lease and the premises demised, and that the lessor may re-enter and expel him there-

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from. The lessee had no right to thrust a new tenant on the plaintiff under the pretense of indebtedness, or any other pretense. As to forfeiture of lease, see Taylor's L. & Ten., § 491, and the sections under the head of "forfeiture;" and as to the principle that tenant cannot remove fixtures after forfeiture or expiration of term, § 551, and cases there cited.

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By the Court, DIXON, C. J. The question, whether, upon general principles, fixtures of a chattel nature, erected by a tenant upon demised premises, for any other purpose than that of ornament, domestic convenience, or to carry on trade, may be removed by such tenant, does not necessarily occur in this case. The tendency of the later American decisions seems clearly to favor such right of removal, but the law on the subject is not well settled, and should it hereafter arise, it will deserve a careful consideration.

In the present case, we consider the usage of the city of Milwaukee, in tenancies like the one under consideration, so clearly established, that we are relieved from determining, upon the principles of the common law, what the rights of the parties would be without it. The general custom of many years' standing in that city, in the absence of any agreement to the contrary, to allow lessees of naked or vacant lots, upon what are commonly called *ground leases*, to erect buildings, and other improvements upon them, and to remove such buildings and improvements at or before the expiration of their leases, is alleged in the answer and was clearly proved. Its existence is not contradicted or denied by the respondent. It is a valid custom, with which the parties to the lease in question must be supposed to have been acquainted, and to have contracted with reference to it in respect to all matters about which their contract is silent. *Van Ness vs. Pacard*, 2 Peters, 148.

It is contended, however, by the counsel for the respondent, that the contract in question is not silent upon the subject matter of the usage; that there are clauses in the lease which are inconsistent with the usage, and to which it must yield. If this be so, the custom cannot prevail. To prove this, two covenants are relied upon; one, in which the lessee

agrees to pay the rent, except in case of the destruction of the premises by accidental fire; the other, in which he promises to quit and deliver them up at the end of the term, reasonable use and wear thereof, and damages by accidental fire, or other accidents not happening through his neglect, only excepted. It is said that the expressions "use and wear," and "damages by accidental fire," can only be applied to buildings and other improvements of a perishable nature, and not to the lot, which is indestructible by such means, and that therefore, by implication from these words, the subsequently erected buildings became a part of the premises, and cannot be taken away. It is to be observed, that in drawing the lease, the parties used one of the printed forms in general use, in which the covenants referred to occurred in print. It is also further to be observed, that the grant or demise itself was of a bare lot or piece of land, described as the north thirty feet of the south one-third of quarter block sixty-nine, in the first ward. No mention is made in it of buildings or improvements of any kind. The rent is small, such as would be paid for a mere lease of the ground. The proof clearly shows, and it is not disputed, that the premises, at the time of the demise, were wholly unimproved. Under these circumstances we do not think that the subsequent occurrence of the apparently inconsistent words, ought to be permitted to change or enlarge the meaning of the word "premises," in connection with which they are used, so as to make it include buildings and other improvements where none are mentioned or contemplated in the granting clause; but that it should be understood in the same sense that it would have been had they not occurred, and held to mean and refer to the *premises demised*, in the situation in which they were when the lease was taken. It seems to us clear that this was the intention of the parties, and it is not inconsistent with the whole instrument. If it were otherwise, the destruction by accidental fire, of the most trivial and unimportant building subsequently placed upon the premises by the lessee, would operate to discharge him from the payment of rent, which certainly was not intended by the lessor. It was not the design of either, that

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the payment of rent should depend at all upon the future erection or destruction of buildings or other improvements. The building in question being, therefore, according to the custom, a moveable fixture, is to be considered the personal property of the tenant, which he may sell or mortgage, and which may be seized and sold on execution against him; and the lessor having, by the terms of the lease, no lien upon it for the rent, it only remains to be determined whether the tenant or the defendant as his mortgagee, had, at the time of the commencement of this action, forfeited or lost their right of removal. The usage being established, and the building being found to have been erected in accordance with it, the rights of the parties stand on the same footing that they would if it were a building erected to carry on trade, or for other purposes, where, by the common law, the tenant would have the privilege of removal. *Van Ness vs. Pacard, supra.*

The rule in such cases is, that the tenant may remove his fixtures at any time during the term, or even after its expiration, provided he yet remain in possession; but if he quit the possession without such removal, it is considered an abandonment of his right. Case last cited, and *Penton vs. Robart*, 2 East., 88. It is contended that the alleged non-payment of rent, and the assignment of the lease and underletting of the premises by the tenant to the defendant, as a further security for the money loaned by him, without the consent of the plaintiff being first obtained in writing, was a forfeiture of the lease, by which the term expired before the action was commenced, and that, therefore, the right of removal was gone. The lease contains a covenant for the payment of rent at the times therein specified, and against assigning or underletting the premises, and provides that if the lessee make default in any of the covenants, he "shall forfeit all right and title to the lease and the premises therein demised, and every part thereof;" and that in that event, it shall be lawful for the plaintiff to re-enter and repossess himself of the same, and expel the lessee therefrom. The objection to the argument is, that the case only shows a *cause* of forfeiture, and for the expulsion of the tenant, but does not show that he, or those who claim under him,

have been, in fact, expelled, or that the plaintiff has re-entered, or repossessed himself of the premises. The tenant, and those claiming under him, were still in possession, claiming the right to hold under the lease, and until it was judicially determined that a forfeiture had taken place, and he and they were ousted, and the plaintiff repossessed by legal process, the term was not expired, and the right of removal remained. In *Penton vs. Robart*, the original term had expired, and the landlord had recovered judgment in ejectment against the tenant, but the tenant remained, in fact, in possession, and being so, the court held that he was not liable, in an action by the landlord, for removing fixtures, erected for the purpose of trade, and that he might lawfully do so. It appears to us, therefore, that the equities of the complaint were fully answered, and that the plaintiff was not entitled to a continuance of the injunction, and that it should have been dissolved.

The order of the circuit court is reversed, with costs.

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[NOTE.—In relation to leases for years, as well as those for life, the happening of a *cause* of forfeiture, does not render the lease void, but voidable only, at the election of the lessor. *Clark vs. Jones*, 1 Denio, 516. Although by the condition of a lease it is provided that if any of the covenants on the part of the tenant are broken, the unexpired term shall cease, if the lease also contains a clause that, in case of the non-performance of such covenants, the landlord may re-enter, the lease is voidable only at the option of the landlord, upon a breach of such covenants, but is not void. *Stuyvesant vs. Davis*, 9 Paige, 427. Such a clause in a lease is a condition, and cannot be construed as a limitation. *The Fifty Associates vs. Howland*, 11 Met., 99. A breach in the condition of a deed, which is not a limitation, but gives a mere right of re-entry, does not avoid the estate. The estate is terminated in such a case by the re-entry of the lessor. *Spear vs. Fuller*, 8 N. H., 174; 11 Met., *supra*; *Arnaby vs. Woodward*, 6 Barn. & Cres., 519. To entitle the lessor to re-enter for non-payment of rent, the common law required a demand of the exact rent due, on the day it fell due, at a convenient time before sunset. *Van Rensselaer vs. Jewett*, 2 Com., 141; *Jackson vs. Harrison*, 17 John. 66. A court of equity will not, generally, lend its active aid to enforce a forfeiture (*Baxter vs. Lanning*, 7 Paige, 350), but regards the clause of re-entry for the non-payment of rent as a mere security for its payment, and will interfere in the tenant's behalf, upon his satisfying the rent due, and any damages which the landlord may have sustained by his default. Taylor's Land. and Ten., 326; Story's Eq. Jur., § 1315.—Baz.]

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DOWNIE vs. HOOVER.

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A railroad company whose charter gives it the general power to make all contracts which its convenience or interest may require, has power, in carrying out the enterprise authorized by its charter, to assign its stock subscriptions, there being nothing in the charter imposing any restriction in that respect.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this case stated, that in May, 1856, the defendant, *Hoover*, made a subscription for five shares of \$100 each, of the capital stock of the Milwaukee and Beloit Railroad Company, to be paid at such times as the directors of said company should prescribe, &c., with a condition that the subscription should not be binding until the sum of \$100,000 should be subscribed to the capital stock of said company, in the city of Milwaukee, independent of corporate aid; and after alleging the subscription of that amount to the stock of said company, in the city of Milwaukee, as required by said condition, and the making of various calls by the directors, for the payment of instalments upon stock subscriptions, under which the whole sum subscribed by the defendant had become due and payable, averred, that before the commencement of this action, the said railroad company, by an instrument in writing, duly executed, for a valuable consideration, and for purposes connected with the business of the company, assigned and transferred to the plaintiff, the said subscription of the defendant to the capital stock of said company, and all claim and demand of said company against the defendant, arising by means thereof. It alleged, also, demand of payment from the defendant, non-payment, &c. The defendant demurred to the complaint, upon the grounds, that it appeared upon the face of the complaint, that the plaintiff had no legal capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action.

The circuit court sustained the demurrer, and from the order sustaining the same the plaintiff appealed.

Adams & Pitkins, for appellant:

A corporation can make all contracts which are necessary

and usual in the course of the business it transacts, as means to enable it to effect the objects of its institution, unless expressly prohibited by law or its charter. *Barry vs. Merchants' Exchange Co.*, 1 Sandf. Ch., 280; *Angell & Ames on Corp.*, 153, § 187; *Pierce on Am. Railroad Law*, 513, 515; 1 Kyd on Corp., 108; *Hoyt vs. Thompson*, 3 Sandf. Ch. R., 416; 1 Selden, 320; 19 N. Y., 207; 32 N. H., 504, 507; 5 Ohio State, 59. They cited, also, as to the power of the company to make the assignment. *Farmers' Loan & Trust Co. vs. Perry*, 3 Sandf. Ch., 339; *Curtis vs. Leavitt*, 1 Smith (N. Y.), 62-66, 169, 219-222, 262; *Madison, &c., Pl. R. Co. vs. Watertown Pl. R. Co.*, 5 Wis., 173; *Rex vs. Mayor and Aldermen of London*, 3 B. & A., 255, 271.

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Coon & Cotton, for respondent, argued that the assignment by the railroad company, of money due on a stock subscription, was unauthorized and void, as against public policy, and cited *McCullough vs. Moss*, 5 Denio, 518.

By the Court, PAINE, J. The single question presented on this appeal is, whether a railroad company, in carrying out the enterprise authorized by its charter, has any power to assign its stock subscriptions. We think it has the power. A stock subscription is nothing but a contract, by which the subscriber is bound to pay the company certain amounts. It would clearly be assignable as between individuals, and we can see no reason why it should not, in the case of a corporation, acting in execution of the powers conferred by its charter.

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The fact that a company may abuse its power, and make contracts ruinous to itself, and to the value of its stock, does not seem to be a sufficient reason for denying the power. For they may, undoubtedly, do this whether this power of assignment exists or not. They may make extravagant contracts for materials, for land, and for labor in building the road, and thus make their stock worthless, as often happens. They become insolvent, receivers are appointed, who may compel the payment of unpaid stock subscriptions for the benefit of creditors, created by these extravagant and ruinous contracts.

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The fact, therefore, that a company may ruin itself by indiscreet contracts, if such an assignment is allowed, is no reason against the power; for it may ruin itself by such contracts without such a power.

At all events, even though it might be a reason for the legislature to impose a restriction, it is no reason for the court, where the charter contains no such restriction, but gives the general power to make all contracts which the convenience or interest of the company may require, to deny the power to make this particular contract. The reasoning in the case of *Clark vs. Farrington*, decided at this term (11 Wis., 306), is applicable to the question. The order of the court below sustaining the demurrer, is reversed, with costs, and the cause remanded for further proceedings.

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Case of *Downie vs. Hoover* ante, p. 174, followed.

A secret agreement between the agent of a railroad company and a person subscribing for its stock, that the sum so subscribed should never be collected, or that it might be discharged in something of less value than the amount expressed in the subscription, is a fraud upon the other stockholders, and payment of the amount subscribed will be enforced, without regard to such agreement.

Parol evidence is not admissible to contradict or vary the terms of a written agreement.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this case was exactly similar to that in the preceding case of *Downie vs. Hoover*. The defendant filed an answer containing several grounds of defense. The first was a denial of the organization of the Milwaukee and Beloit R. R. Co.; the second, a denial that at the time of the pretended election of directors of said corporation, in March, 1856, there had been \$50,000 of the capital stock thereof subscribed, as required by law, to authorize such election. The third, states that sometime in May, 1856, one Reymert,

who claimed to be an agent of said company, met the defendant and one Fitzgerald, and told them he had a book of subscriptions to the capital stock of said company, and wanted their names as subscribers; that the defendant refused to become a subscriber, but Reymert stated that he only wanted their names as a matter of form; that their names would be of service to him on account of their being known in the towns through which the said railroad was to run, and that if they would put their names down for \$500 each, they should never be called upon to pay; that the defendant, induced by these representations solely, and not intending to bind himself as a subscriber, either wrote his name in said book in pencil, or authorized said Reymert so to write it; that sometime afterwards he was called upon by an agent of said company for payment of several instalments, but refused to pay or admit himself liable as a subscriber; but subsequently, at the instigation of others, did pay and give to said company \$225, as a mere bonus to aid the work, as a benefit to the city of Milwaukee, as a mere gift and not as a matter of legal obligation. The fourth, denies that the company had any legal right or power to sell or transfer the alleged subscription of the defendant, or to empower the plaintiff to maintain an action on the same. The fifth, is a denial of any knowledge or information as to the other matters stated in the complaint.

The evidence given or offered on the trial, so far as material to the questions presented on the appeal, was as follows: The plaintiff, after giving in evidence the charter of said railroad company and the subscription made by the defendant for \$500 of its stock, introduced proof tending to show the making and notice of assessments therefor as stated in the complaint, and that over \$100,000, had been subscribed to the capital stock of said company, in the city of Milwaukee, independent of corporate aid, and that the subscriptions were *bona fide*; but on cross-examination, a witness called by the plaintiff testified, that certain of said subscriptions, aside from the one on which this action is founded, were subject to secret or private conditions as to the mode and amount of payment, so as to make them colorable only; one subscrip-

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tion of \$5,000 having been made with a private understanding that the amount really to be paid should be fixed upon at a future day, and having been afterwards discharged by the transfer of other railroad stock worth about \$500, and another subscription of \$5,000 having been made with an understanding that it should be paid by the bond of a third party, which bond was accordingly accepted by the company, but had never been collected.

The plaintiff objected to the evidence thus given upon the cross-examination of the witness, but the court overruled the objection. The plaintiff's counsel then offered in evidence an instrument in writing executed by the Milwaukee and Beloit Railroad Company, dated December 16, 1858, assigning to the plaintiff certain claims due to said company upon subscriptions of stock, among which was the claim upon the defendant White for \$275, and offered to prove that the said assignment was made to the plaintiff in payment for money advanced by him toward the construction of the railroad of said company; but the counsel for the defendant objected to the evidence, on the ground that the company had no power to assign its stock subscriptions, which objection was sustained by the court, and its ruling excepted to by the plaintiff's counsel. Thereupon the court instructed the jury to find a verdict for the defendant; and the jury having so found, and judgment having been rendered thereon, the plaintiff appealed.

Adams & Pitkin, for appellant.

Levi Hubbell, for respondent.

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By the Court, PAINE, J. This case presents the same question as that decided in *Downie vs. Hoover*, which must be here decided in the same way.

In this case, however, an answer was filed and a trial had. But we do not think the secret understanding which the defendant sets up, to the effect that his subscription was to be merely colorable, nor the evidence offered showing an understanding of a similar kind with other subscribers, constitutes any defence whatever. Such agreements are an obvious fraud upon the other subscribers; and the written subscrip-

tion should be enforced, without regard to them. *Brown vs. Appleby*, 1 Sandf., 170; Redfield on Railways, § 48 and note 1; *Blodgett vs. Morrill*, 20 Vt., 509; *White Mountain R. R. vs. Eastman*, 34 N. H., 124.

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The third paragraph of the defendant's answer is liable also to the objection, that it sets up a contemporaneous parol understanding inconsistent with the terms of the written agreement.

The judgment must be reversed with costs, and the cause remanded for a new trial.

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The transfer of a note secured by a mortgage, carries with it the interest in the mortgage.

A reasonable solicitor's fee, in case of a foreclosure, may be stipulated for in a mortgage, and recovered.

A judgment of foreclosure of a mortgage, where a portion of the mortgage debt is not due, should determine the sum actually due to the plaintiff for principal and interest, and also the whole amount secured by and unpaid upon the mortgage, with interest, and should contain a provision for a stay of proceedings, in case the defendant, before the sale, shall pay to the plaintiff, or to the sheriff, the amount found due, with interest and costs. *Howe vs. English and others*, 6 Wis., 262, referred to and followed.

The judgment in such a case should be for the whole sum secured by the mortgage and unpaid; and where the court is satisfied, from the referee's report, that the property may properly be sold in parcels, should direct the sale of so much thereof as may be necessary to pay the amount due with costs, &c., and should also provide that the plaintiff, upon default in the payment of any instalments of principal or interest still to become due, may, on application to the court, obtain a further order, founded on the judgment, for the sale of so much of the mortgaged premises as may be sufficient to satisfy the amount so to become due, with costs of the petition and subsequent proceedings thereon; and so on from time to time, as often as default shall happen.

APPEAL from the Circuit Court for Racine County.

This was an action commenced in April, 1858, to foreclose a mortgage given to secure the payment of four notes, two only of which were due at the commencement of the suit, the others not falling due until January, 1859. The notes and mortgage were executed by *Cribb* and *Appleton*, to one *Mygatt*; and the complaint alleges that the notes were as-

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signed by the payee to the plaintiff. The mortgage stipulated for the payment, by the mortgagor, of fifty dollars as solicitor's fee, in case of a foreclosure. During the progress of the cause, an order was made by the circuit court, by which it was referred to a court commissioner, "to take the evidence in the action, and to compute, ascertain and report the amount actually due to the plaintiff, for principal and interest on said notes and mortgage, and which remains unpaid, including interest thereon to the date of the report; also to take proof of the facts and circumstances stated in the complaint, and report the same to the court; and also to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels without injury to the interests of the parties; and if he should be of the opinion that a sale of the said premises in one parcel will be most beneficial to the parties, that he report his reasons for said opinion."

The referee made a full report as to the matters referred to him, showing that the amount due to the plaintiff, at the date of the report, was \$1,353,20; that the whole amount secured by the mortgage and unpaid, was \$2,530,43; and that the mortgaged premises could be sold in two different parcels, without injury to the interests of the parties. The judgment, which was rendered on the 3d of November, 1858, after reciting the order of reference, and the report thereon, proceeded as follows: "It appears that the sum of \$1,353,20, was due [on said mortgage] at the date of said report, and that the premises can be sold in parcels, and on motion of the attorney for the plaintiff, it is adjudged, that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction, &c.; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said sheriff pay to the plaintiff or his attorney, the sum of \$54,44, adjudged to the plaintiff for costs and charges in this action, as also the sum of \$30,00, which is

hereby allowed to the plaintiff, on application therefor, in addition to the said costs, pursuant to the statute, making together the sum of \$84,44, with interest thereon from the date hereof, and also the amount so reported due as aforesaid, making, in all, the sum of \$1,437,64, together with the legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; that he bring the surplus moneys arising from such sale, if any there be, into court without delay, to abide the further order of the court; that he make a report of such sale, &c.; that if the proceeds of such sale be insufficient to pay the amount so reported as due the plaintiff, with interests and costs, as aforesaid, that the said sheriff specify the amount of such deficiency in his report of sale; and that the defendants, *James Cribb* and *Samuel B. Appleton*, pay the same to the plaintiff, and that the purchaser be let into possession, &c. It is further adjudged, that the defendants, and all claiming under them after the filing of notice of the pendency of this action, be forever barred," &c. Here followed a description of the mortgaged premises. From this judgment and the order therefor, the defendants appealed.

Geo. B. Judd, for appellants:

Although the evidence reported by the referee shows that the premises could be sold in separate parcels without injury to the parties, yet the judgment fails to designate in what order the different parcels shall be sold, but is absolute for the sale of the whole premises. R. S., 858, §6; 5 Paige R., 38; 6 id., 35; 5 John. Ch. R., 235.

Only a part of the amount secured to be paid by the mortgage had become due; yet the order for judgment, and the judgment itself, are peremptory and absolute for the sale of the premises, and omit to provide, as required by law in such cases, that if, previous to the sale, the defendants shall bring into court the principal and interest due, with costs, the proceedings in the action shall be stayed. R. S., 858 §§ 4 and 5; *Howe vs. English*, 6 Wis., 262; 2 John. Ch. R. 486; 4 id., 534.

The report of the referee is also defective.

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O. S. Head, for respondent:

The judgment herein is in due form. The report of the referee showed that the whole amount secured by the mortgage was not due, and also, *that the premises could be sold in parcels*. For form of judgment in such case, see 2 Barbour's Chancery Practice, p. 617. The judgment herein is drawn in accordance with the above form.

The only case in which the plaintiff is entitled to a judgment of foreclosure and sale for a greater sum than is then due, is where the premises cannot be sold in parcels. R. S., c. 145, §§ 6, 8 and 9; 2 Barbour's Ch. Pr., p. 615.

The judgment, in this case, being for no more than the amount actually due, and the premises being susceptible of division, it would have been error if the judgment had been conditional. R. S., c. 145, § 5; *Howe vs. English*, 6 Wis., 262.

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By the Court, DIXON, C. J. A reference to the judgment roll sent with this case, shows that the counsel for the appellants was mistaken in supposing that the referee named in the order of reference had failed to comply with its requirements. The report was a full and complete answer to all matters referred to him. We can discover no errors in the proceedings, from the time of the making of the order of reference, up to, and including the filing and confirmation of the referee's report. The objection of usury is clearly untenable, and the fact, that there was no formal assignment of the mortgage produced and proven, cannot, at this day, be listened to, as a defense in a foreclosure action. The transfer of the notes carries with them the interest in the mortgage. We are of opinion, however, that the judgment, as rendered, is erroneous and irregular in matters of substance as well as of form, and that it must, therefore, be reversed.

The action was commenced to foreclose a mortgage, where a part only of the principal sum secured, with interest, was due, the residue being payable at a future time. The judgment, instead of adjudging and determining the sum actually due to the plaintiff at the date of the report of the

referee, for principal and interest, *and* the amount secured by, and unpaid upon the notes and mortgage, with interest to the date of such report, *only* adjudges and determines the sum actually due. There is no provision for a stay of proceedings under the judgment, in case the defendants should, before the day appointed for the sale, pay to the plaintiff, his attorney or the sheriff, the amount found actually due, with interest and costs. If this was necessary in a judgment like that in the case of *Howe vs. English* 6 Wis., 262, it is certainly equally so here. No reason can be urged for its insertion in that case, which does not exist in equal degree in this; and although I can see no particular necessity for it in either, yet as it has once been adopted by this court, no great harm or inconvenience can ensue from its enforcement when it is once understood by the profession. The only feature in which this case differs from *Howe vs. English*, is that there the referee found and reported that the mortgaged premises were so situated that they could *not* be sold in parcels, while here he found and reported that they could be so sold. The mortgagor's right, by payment, to stop proceedings, is of course not affected by this circumstance. But the most substantial defect in the judgment under consideration, in our opinion, consists in its failure to make any provision, or to give any direction, as to the instalments of principal or interest which were thereafter to become due. The judgment is in the precise form in which it would have been, if the principal and interest actually due were the entire amount secured by or unpaid upon the mortgage. The pleader seems to have acted upon the idea that he was at liberty to proceed in this manner to enforce the payment of the sum actually due; and that upon the judgment thus obtained having performed its functions, or upon the payment of the same by the mortgagors, and a default accruing in the payment of a future instalment of principal or interest, the plaintiff could commence a fresh action of foreclosure. A glance at the provisions of sections 86, 87, 88, 89 and 90, of the statutes of 1849, under which this judgment was entered, which are identical with sections 4, 5, 6, 7 and 8, of chapter 145, of the statutes of 1858, will show that this notion is quite a

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mistaken one. The first section provides, that whenever an action shall be commenced for the satisfaction or foreclosure of any mortgage, upon which a part only of the principal or interest shall be due, and other portions to become due subsequently, the action shall be dismissed, upon the defendant's bringing into court, at any time before the order of sale, the principal and interest due, with costs. The second, that if, after an order of sale shall be entered against a defendant in such case, he shall bring into court the principal and interest due, with costs, the proceedings shall be stayed; *but the court shall enter judgment of foreclosure and sale, to be enforced by a further order of the court upon a subsequent default of payment of any principal or interest thereafter to grow due.* The third, that if the defendant shall not bring into court the amount due, with costs, or if for any other cause judgment shall be entered, the court shall direct a reference to a proper officer, to ascertain and report the situation of the mortgaged premises; and if it shall appear that the same can be sold in parcels, without injury to the interests of the parties, the judgment shall direct so much of the premises to be sold as will be sufficient to pay the amount then due, with costs, *and such judgment shall remain as security for any subsequent default.* The fourth of the sections above referred to declares, that if, in the case mentioned in the preceding section, there shall be any default subsequent to such judgment, in the payment of any portion or instalment of the principal, or of any interest due upon such mortgage, the court may, upon petition of the plaintiff, by further order *founded upon such first judgment*, direct a sale of so much of the mortgaged premises to be made under the judgment, as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon; and the same proceedings shall be had as often as default shall happen. These provisions sufficiently show that there is to be but *one* judgment of foreclosure and sale. It being a proceeding *in rem*, as well as *in personam*, and most frequently attended with heavy expenses, it would, beside the inconsistency of allowing several judgments to be entered for the foreclosure of one mortgage, be a most grievous burden, if

the mortgagors were to be subjected to costs of a separate action and judgment, on each default in the payment of any portion of the principal or interest. There can be but one judgment, and in a case like the present, it should contain an order that the plaintiff, upon default in the payment of any instalments of principal or interest thereafter to grow due upon the notes and mortgage, be at liberty to come before the court, and, upon petition, to obtain a further order, founded on such judgment, directing the sale of so much of the mortgaged premises as will be sufficient to satisfy the amount so due, with costs of petition and subsequent proceedings thereon, and so on from time to time, as often as a default shall happen. This, in our opinion, is the course of proceeding plainly indicated by the statute; and in a case like the present, it might be very doubtful whether, after taking a judgment like that appealed from, the plaintiff could, on default of the payment of a future instalment, resort to the mortgage as a security to enforce it. We were referred by the respondent's counsel to the forms commencing on pages 615 and 617 of the 2d volume of Barbour's Chancery Practice. That commencing on page 615, is where a part only of the debt is due and the premises *cannot* be sold in parcels. It was upon this that *Howe vs. English* was decided. That beginning on page 617, is where a part of the debt is not due and the premises *can* be sold in parcels. It was this last which the counsel says he pursued in the present case. An examination of it, if we are to go to *forms* to ascertain the law, will show that it not only finds the amount actually due, but the sum secured and unpaid upon the mortgage, and also that it decrees that on the foot of the judgment a further order of sale may be made, to satisfy any subsequent instalment of principal or interest which may thereafter remain unpaid. In this respect it was probably a compliance with the requirements of the statutes of New York, from which our own are for the most part taken.

This court has frequently held that a reasonable solicitor's fee, in case of foreclosure, might be stipulated for in the mortgage and recovered in the action; and in the present case we do not think it unreasonable that the plaintiff, in ad-

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dition to his statutory costs, should recover that which the defendants agreed to pay.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

VAN NESS and another, impleaded with NICHOLS and others, vs. CORKINS.

Where a motion is made during the progress of a cause, it is irregular to order that the costs allowed on a denial of the motion be entered in the final judgment in the action. The payment of such costs is to be enforced by a special proceeding, to be taken according to the provisions of chapter 149 of the Revised Statutes of 1858.

A judgment may be entered against any one or more of several defendants, wherever a several suit might have been brought, or a several judgment upon the facts of the case would be proper; and that without regard to the character of the complaint, and whether it alleges a joint or several liability.

ERROR to the Circuit Court for *Rock* County.

The facts in this case are sufficiently stated in the opinion of the court.

Knowlton, Prichard & Jackson, for plaintiffs in error.
Conger & Hawes, for defendant in error.

July 10. *By the Court*, DIXON, C. J. This was an action commenced by the defendant in error (plaintiff below) in the circuit court for the county of Rock, against *Van Ness* and *Hill* as the makers, and *Nichols* and others as the indorsers, of a promissory note, to recover a sum of money alleged to have been due upon the same. The summons was regularly served upon *Van Ness* and *Hill* in the county of La Crosse, where they resided. *Nichols* and others, the indorsers, who resided in the county of Rock, were not served. No attempt was made to serve them. *Van Ness* and *Hill* answered, setting up that the note was given to *Nichols* and others, the payees and indorsers, on the purchase from them of a portable grain mill, which was warranted by the payees to be perfect in all its parts and machinery, and to do business in a particular

manner, and alleging a breach of the warranty, and damages to the full amount of the note, and that the defendant in error was not a *bona fide* holder of it. The answer was accompanied by a demand that the trial be had in the proper county, to wit, the county of La Crosse, instead of the county of Rock, as designated in the complaint. This demand was followed by a motion to the court at the same term of, but before the trial, that the venue be accordingly changed. This motion was overruled with five dollars costs to be paid by the defendants to the plaintiff below; and it was further ordered that the same be inserted in the judgment in the case as costs of the action. At a subsequent day of the term the cause was tried before a jury, who returned a verdict for the plaintiff and against the defendants below, for the amount of the note and interest. Upon the receipt of the verdict, the attorneys for the plaintiff suggested that the defendants *Nichols* and others, indorsers, had not been served with process, and asked leave of the court to enter the verdict and judgment against *Van Ness* and *Hill* alone, which was accordingly granted. That the verdict and judgment were so entered, appears from recitals contained in the judgment itself.

A bill of exceptions, embodying the exception of the defendants *Van Ness* and *Hill* to the order of the court refusing to change the place of trial, was afterwards settled; but on the case reaching this court, it was stricken out for irregularity. And although we are, for that reason, precluded from considering the regularity of the order, yet we may be permitted to say that it was clearly irregular in directing that the costs allowed on the motion be inserted in the final judgment of the cause. Such costs form no part of those finally taxable on the recovery of judgment. The payment of such costs is to be enforced by a special proceeding, to be taken according to the provisions of chapter 149 of the Revised Statutes, which are the same as those of chapter 115 of the Revised Statutes of 1849. This direction to insert the costs in the judgment, might result in a reversal of the order itself in that respect, for how could the court foresee that the plaintiff was to recover judgment? If the defendants succeeded on the trial, and the costs were inserted, then

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they would receive the costs of the motion instead of paying them. The case does not show whether these costs were included in the final judgment or not, and therefore, it is unnecessary for us to consider how their insertion would affect the judgment.

After the bill of exceptions was rejected, it was still contended by the counsel for the plaintiffs in error, that the judgment must be reversed, because it was irregular in being entered against the defendants *Van Ness* and *Hill* alone. But in this we think they are mistaken. Under the 184th section of the Code, (sec. 26, chap. 132, R. S.,) a judgment may be entered against any one or more of several defendants, wherever a several suit might have been brought, or a several judgment upon the facts of the case would be proper; and that without regard to the character of the complaint, and whether it alleges a joint or several liability. The true test is, whether a separate action might have been maintained; and if it could, a several or separate judgment is proper. The complaint in this case alleged a separate cause of action against the defendants *Van Ness* and *Hill*, as the makers of the note. The plaintiff might, at his option, have brought a separate action against them. At the common law, he would have been compelled to do so. By section 24 of the Code, (sec. 21, chap. 122, R. S.,) he may include any or all of the parties to a bill or note in the same action, to suit his pleasure or convenience. Section 174 of our Code was identical with section 274 of the Code of New York; and as to the construction which it has received by the courts of that state, see 1 Kern., 294; 2 id., 336; 15 Barb., 524; 16 id., 33; 19 id., 321; 21 id., 26; 9 How., 204; 8 id., 151; 3 E. D. Smith, 591; and 2 Abb., 358.

The judgment of the circuit court is therefore affirmed, with costs.

ADLER VS. COLE and others.

The district court of the United States for the district of Wisconsin, has the power to adopt by rule, and, in the cases provided by law in this state, to is-

sue, in common law actions, process of attachment against the property of debtors, as a provisional remedy, according to the form and mode of proceeding prescribed by the Code of Procedure of this state.

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In an action by a vendee of goods, against a creditor of the vendor, who caused the goods to be seized under an attachment as the property of the vendor, and against the officer who seized the goods under such attachment, an averment in the answer, that the goods, at the time of such seizure, were the property of such vendor, is sufficient to authorize the introduction of proof showing that the sale under which such vendee claimed title, was fraudulent and void as to creditors.

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APPEAL from the Circuit Court for *Milwaukee* county.

The complaint of *Solomon Adler*, the plaintiff, alleged:

1st. That the defendants, *Cole, Thomas, Reed* and *Cogswell*, on, &c., forcibly and wrongfully took from the possession of the plaintiff, and carried away certain goods of the value of \$4,000. 2d. That the defendants, on &c., forcibly and wrongfully arrested the plaintiff, without any reasonable, lawful or probable cause, and held him in custody for about two hours. 3d. That the defendants, on, &c., wrongfully and forcibly entered into a certain tenement, then in the possession of the plaintiff, and occupied by him as a store, and expelled him therefrom, and wrongfully and forcibly kept possession of the same for seven days.

The defendants answered: 1st. By a general denial. 2d. That on the third day of November, 1857, said *Cole* and others, composing the firm of *Fenton, Lee & Co.*, sued out from the U. S. district court for the district of Wisconsin, a writ of attachment, under the seal of said court and attested by the clerk thereof, against the property of *Joseph H. Adler* and *Lewis Shiff*, composing the firm of *Adler & Shiff*, who were indebted to said firm of *Fenton, Lee & Co.*; that said writ of attachment was directed and delivered to the marshal of said district of Wisconsin, and commanded him to attach all the property and effects of the said *Adler & Shiff*, or so much thereof as would satisfy their indebtedness to said *Fenton, Lee & Co.*; that said writ of attachment was placed by said marshal in the hands of said *Reed*, then a deputy marshal for said district, who, by virtue thereof, entered the said store, and seized upon and took the goods referred to in the complaint, as the goods and property of the said *Adler & Shiff*; that the said goods and chattels were, at the

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time of the service of the said writ of attachment, the property of said firm of *Adler & Schiff*, and liable to attachment or execution by their creditors; that the defendant *Thomas*, at the said time, when, &c., was the marshal of the U. S. for said district, and the defendant *Cogswell*, at the request of said *Reed*, aided in taking an inventory of said goods, and the defendant *Cole*, as one of the plaintiffs in said attachment, directed said marshal to seize and levy upon said goods by virtue of said writ; which is the same trespass complained of, and no other or different.

And the defendants further say, that at the time of the service of the said writ of attachment, the said *Reed*, as such deputy marshal, demanded of said *Solomon Adler*, the plaintiff, a certificate of the goods, property, credits and effects in his hands, belonging to the said *Joseph H. Adler* and *Lewis Schiff*, or either of them, which certificate the said *Solomon* refused to give; that thereupon an affidavit was made and presented to the judge of the U. S. district court for said district, asking the said judge for an order, that said *Solomon Adler* appear before the said judge, and answer concerning the property in his hands belonging to said *Joseph H. Adler* and *Lewis Schiff*, or either of them; that said order was duly served on said *Solomon*, and he refused to appear before said judge and answer, as commanded by the said order; that upon such refusal, application was made for an attachment against said *Solomon*, for contempt of court, and the said court did, thereupon, issue an attachment against the said *Solomon*, and therein directed the said marshal to bring said *Solomon* before said court, and the same was placed in the hands of said marshal to be executed, and the defendant *Thomas*, marshal as aforesaid, by virtue of said attachment, did arrest and bring before said court, the said *Solomon Adler*, which is the same arrest that is stated in the complaint.

On the trial, the plaintiff introduced evidence, that in November, 1857, he was in possession of a store previously occupied by the firm of *Adler & Schiff*, and of a stock of goods therein, and that the defendant *Reed*, took all the

goods, locked up the store, and excluded the plaintiff therefrom.

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Upon cross-examination, one witness for the plaintiff, who had testified to these facts, stated that the firm of *Adler & Schiff* were in possession of the goods before *Solomon Adler* was; and thereupon the counsel for the defendants asked the witness: "How, and by what authority, did *Solomon Adler*, the plaintiff, come into possession and hold that store and the goods?" This question was objected to by the counsel for the plaintiff, for the reason that it was not proper cross-examination, and because, in the then position of the case, the answer was immaterial; which objection was sustained by the court, and the defendants' counsel excepted. The plaintiff also asked a witness called by him, the following question: "Were you present, in the fall of 1857, at the time of the arrest of *Solomon Adler* by the marshal?" to which question the defendants' counsel objected, for the reason that the question showed an arrest by an officer, and that the warrant under which the arrest was made, was the best evidence. The court overruled the objection, the defendants' counsel excepting, and the witness then testified that he was present at the arrest, and that the marshal, *Mr. Reed*, said: "I have got a warrant or attachment to arrest you," and took the plaintiff off with him; but the witness could not say how long he was detained. The witness further stated: "The marshal was at the store over night. I saw *Mr. Reed*, *Mr. Cole*, *Mr. Cogswell*, *Solomon Adler*, and some of his clerks there. At the time the marshal arrested *Mr. Adler*, he exhibited a warrant to him." The defendants' counsel here moved the court to exclude all the evidence in relation to the arrest of the plaintiff, for the reason that it appeared that the arrest was by a warrant, and the warrant was the best evidence; which motion the court overruled, and the defendants' counsel excepted. The plaintiff also introduced evidence tending to show the value of the stock of goods in said store.

The defendants, to maintain the issue on their part, offered in evidence the record of a certain suit and proceedings in the district court of the United States for the district of Wis-

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consin, in which *Aaron D. Fenton, Oliver H. Lee, William H. Davis* and *Merrit T. Cole*, were plaintiffs, and *Joseph H. Adler* and *Lewis Shiff* were defendants. This record contained:

1. The affidavit of *Merrit T. Cole*, one of the plaintiffs in said suit, showing that said plaintiffs had a cause of action against *Adler & Shiff*, the defendants therein, to the amount of \$1,898 53, upon a promissory note and an account therein particularly set forth, and that said defendants had removed and disposed of their property, with intent to defraud their creditors, and had pretended to assign all their merchandise and stock in trade, and all debts and demands due them, to one Solomon Adler in trust for creditors. On this affidavit was endorsed the following order: "Nov. 23d, 1857. Let an attachment issue, which is now allowed, on the plaintiffs' giving bond with surety in the penalty of \$250. A. G. MILLER, Judge."

2. An attachment bond in the usual form, in the sum of \$250, payable to *Adler & Shiff*, signed and sealed by Charles Kupper and *Merrit T. Cole*, and purporting to have been executed by *Aaron D. Fenton, Oliver H. Lee* and *William H. Davis*, by *Merrit T. Cole*, their attorney in fact, with the affidavit of said Kupper annexed thereto, that he was worth \$500, exclusive of property exempt from execution, and of his debts. There was an endorsement on the said bond as follows: "Nov. 23d, 1857. Bond approved. A. G. MILLER, Judge."

3. A præcipe, directing the clerk of said district court to issue "a writ of attachment" in the case of *Fenton, Lee & Co. vs. Adler & Shiff*, in a plea of trespass on the case, &c., damages \$3,000.

4. A writ out of the said district court, tested the 23d day of November, 1857, and sealed with its seal, directed to the marshal of said district, whereby, in the name, &c., he was commanded to summon *Joseph H. Adler* and *Lewis Shiff* to appear before the said district court, &c., to answer unto *Aaron D. Fenton, Oliver H. Lee, William H. Davis* and *Merrit T. Cole*, in a plea of trespass on the case on promises, to their damage \$3,000, and by which he was further required and commanded to attach and safely keep all the property

of the said *Joseph Adler* and *Lewis Shiff* within his district, or so much thereof as might be sufficient to satisfy the demand of the said plaintiff, amounting to \$1,398 53, together with costs and expenses, and that of said writ he make due return; together with a return to said writ by said marshal, to the effect that he had, by virtue thereof, on the 23d day of November, 1857, attached the property described in an inventory annexed thereto, (being the same goods described in the complaint in this action,) and had caused the same to be appraised by two disinterested freeholders of the proper county, who were first by him duly sworn to make a true appraisement thereof, (which inventory and appraisal are returned with said attachment,) and that he served the writ on *Joseph H. Adler* and *Lewis Shiff*, by showing them the said writ, and giving to each of them a certified copy thereof, (together with a certified copy of the inventory of the property attached) on the 30th day of November, 1857; and that he made further service of said writ, by leaving a certified copy thereof, with garnishee notice, with *Solomon Adler* on the 23d day of November, 1857. The said garnishee notice was as follows, (style, date, address and signature being here omitted :) "By virtue of a writ of summons with attachment, a copy of which is hereunto annexed, and by direction of the plaintiff's attorney, I hereby attach all the property, real or personal, goods and chattels, moneys, choses in action, debts, credits and effects, which *Joseph H. Adler* and *Lewis Shiff*, the defendants in said writ of summons with attachment, have in your hands, or which is in your possession, or under the control of any or either of you, belonging to said defendants, or either of them, or in which they may have an interest, either legal or equitable. And you are also hereby notified to forthwith furnish me with a certificate under your hand, of the amount and description of all the property and effects which you hold for the benefit of, and debts owing to the defendants in said writ."

5. The affidavit of *Duncan C. Reed*, deputy marshal as aforesaid, made on the 25th day of November, 1857, that he served the writ of attachment above referred to; that a certified copy of said writ was left with said *Solomon Adler*, on

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the 23d day of November, 1857, for the purpose of attaching all the property, money and effects in his hands, belonging to said *Adler & Shiff*, and that a statement thereof was at the same time demanded from said *Solomon Adler*, and that said *Solomon Adler* had not furnished the deponent with a statement of the amount and description of the property held by him, belonging to the said *Adler & Shiff*, or either of them. Upon this affidavit was endorsed the following order: "Nov. 25th, 1857. *Solomon Adler* is notified and required to appear before the district court of the United States at the court room in Milwaukee, on Friday, the 27th inst., at 10 o'clock A. M., and be examined on oath concerning the property in his hands. A. G. MILLER." To this order return of service was made as follows: "Served on the within named *Solomon Adler*, by showing him this order, and delivering him a copy thereof, this 26th day of November, 1857. (Signed,) M. J. THOMAS, Marshal, by D. C. REED, Deputy."

6. An attachment against the said *Solomon Adler* for contempt, for his not appearing before said court in pursuance of said order; the command of which writ to the said marshal was as follows: "You are hereby commanded to attach *Solomon Adler* and him safely keep, so that you may have him before the district court of, &c., forthwith, to answer as for contempt, for his not appearing in pursuance of an order and motion to appear in court, and submitting to an examination on oath concerning property in his hands belonging to the defendants, in the case of attachment of *Aaron D. Fenton*, *Oliver H. Lee*, *William H. Davis* and *Merritt T. Cole*, against *Joseph H. Adler* and *Lewis Shiff*, and of this writ make due return." On this writ was endorsed the following return: "Served by arresting the defendant. M. J. THOMAS, Marshal, by D. C. REED, Deputy."

7. The declaration filed in said district court, on the first Monday of December, 1857, in the suit of *Fenton, Lee & Co.*, against *Adler & Shiff*, upon the same causes of action set forth in the affidavit upon which the attachment was founded; and a judgment in said action for \$1,320 47, besides costs, rendered on the 5th day of January, 1858.

The counsel for the plaintiff objected to the admission of said record in evidence, for the reasons that the affidavit for the attachment was by one of the defendants, and makes evidence in their own favor; that the U. S. district court for the district of Wisconsin has no jurisdiction over the writ of attachment as a mesne process, and that the offer embraces too much; which objection was sustained, the court deciding that the record as a whole could not be read, and the defendants excepted. Thereupon, the defendants offered to read in evidence the affidavit of *Merrit T. Cole*, the order of the judge allowing the attachment, the bond, the *præcipe* and the writ of attachment, as the same are set forth in the record aforesaid. This offer was objected to by the counsel for the plaintiff, for the reasons last above stated, and also, because the *præcipe* calls for a writ of attachment; which objection was sustained by the court, and the defendants excepted. Thereupon, the defendants offered to read in evidence the writ of attachment, the return of the marshal thereon, and the schedules attached; to which the plaintiff's counsel objected, for the reason that the said district court had no jurisdiction to issue the process, and because there was no proper bond, the bond offered as a part of the record purporting to be executed by an attorney in fact, and no authority thus to execute it accompanying the same, nor anything to show his authority to execute it; and because the goods were attached before there was any service on the defendants. The court decided that the papers should be read, and the same were read, the plaintiff's counsel excepting. The defendants then called as witnesses George Cogswell and Frederick Wardner, who testified that they were the persons selected by the marshal to appraise the goods taken under the attachment, and that the value of the goods was \$2,588. The counsel for the plaintiff put to each of the witnesses the following question: "Were you, on the 27th day of November, 1857, a freholder?" To which question the counsel for the defendants objected, for the reason that the same was irrelevant and not proper cross-examination; but the court permitted the question to be put for the purpose only of impeaching the credibility of the witnesses, and

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the defendants excepted. The witness Cogswell answered, that at the date of the appraisal he was a freeholder; and to the question, "Where was your freehold?" which was objected to for the same reason, but admitted by the court for the purpose of impeaching the credibility of the witness, he answered, that he did not know that he had any title to land in Wisconsin, and could not tell where he had any; that he once had forty acres in Genesee county in Michigan, and did not recollect having made any conveyance since that time. The witness Wardner answered that he was not a freeholder, but afterwards added that he had a small piece of land—a lot in the cemetery—and a deed of it. Several questions were put by the plaintiff to the defendants' witnesses, as to what was said at the time of the attachment, &c., and other questions for the purpose of testing the accuracy of the appraisal, but the answers not being material to an understanding of the decision made by the court, they are here omitted. The defendants then offered in evidence the entire record, before referred to, in the case of *Aaron D. Fenton et al. vs. Joseph H. Adler et al.*, which was objected to, for the following reasons:

1. The answer does not set up facts under which the proof can be admitted. The U. S. district court had no jurisdiction to issue an attachment for the taking of the goods.
2. The defendants do not offer to follow it up with proof to show any fraud in the transfer of the property from *Adler & Shiff* to the plaintiff.
3. The offer is an entirety, and should be more limited.
4. The offer is immaterial under the pleadings.
5. The officer's return to the writ of attachment does not show a legal execution thereof.
6. The judgment is not evidence, as against the plaintiff, of an indebtedness at the time he, the plaintiff, got title to the goods.
7. There is no proof, or offer of proof, that the plaintiff derived title from *Adler & Shiff*.
8. The U. S. district court had no jurisdiction to issue an attachment against the person of *Solomon Adler*.

9. The affidavit and proceedings to attach him were illegal. June Term,
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10. The defendants, not having obeyed the law in the execution of the writ of attachment, are not protected under it. ADLER
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The court ruled out the affidavit of *Reed*, the order thereon, the writ of attachment for the person and the return thereon, holding that the district court had no jurisdiction over the same; to which ruling the defendants' counsel excepted; but under the objections of the counsel for the plaintiff, the court permitted the remaining portion of said record to be read, "for the purpose only of showing an indebtedness in favor of the plaintiffs in the said attachment suit against *Adler & Schiff*, and that they were creditors of *Adler & Schiff*."

The defendants thereupon offered the said record, leaving out all the papers relating to the arrest of *Solomon Adler*, for the purpose of showing all the preliminary steps in the attachment suit, and as a justification to the defendants, and for all other lawful purposes; which offer was objected to by the counsel for the plaintiff, for the same reasons as above given. The objection was sustained by the court, and the defendants excepted. The defendants then called upon the plaintiff to produce the original assignment of *Joseph H. Adler* and *Lewis Schiff* to him, which was produced, and it was admitted by the plaintiff that it was the only assignment executed by the said *Adler & Schiff* to the plaintiff, but did not contain the schedule of assets, which the plaintiff admitted was in his possession on the day the trial commenced, but was then lost. And thereupon the defendants offered to give in evidence, the said assignment. The instrument thus offered was executed the first day of November, 1857, and purported to assign and transfer to *Solomon Adler* the stock of merchandise, &c., belonging to *Adler & Schiff*, and all debts and demands due to them, in trust to sell and dispose of said goods, &c., and collect and get in the said debts and demands, and out of the proceeds to pay in full certain preferred creditors, and to distribute the balance ratably among the other creditors of said firm of *Adler & Schiff*, a list

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of whom, with the amount respectively due to each, was annexed to said assignment. The plaintiff objected to the admission of said assignment in evidence, for the reason that it was immaterial under the pleadings. The court sustained the objection, and the defendants excepted.

The defendants, in connection with their former offer, then offered evidence to show that the assignment of *Adler & Shiff* to the plaintiff was fraudulent and void as to their creditors, and made for the purpose of hindering and delaying said creditors in the collection of their debts; which offer was objected to by the plaintiff, for the reason that the evidence was immaterial under the pleadings. The court sustained the objection, and the defendants excepted.

The defendants further offered evidence to show that *Solomon Adler*, the plaintiff, colluded and combined with *Adler & Shiff*, in the conveyance of their property by the assignment and otherwise, for the purpose of defrauding, hindering and delaying their creditors, and the plaintiffs in the aforesaid attachment suit in the district court, out of their debts; and that the said plaintiffs were creditors of *Adler & Shiff*, at the time of the issue of the said attachment; which evidence was objected to by the plaintiff, as being immaterial, and not tending to prove the issue under the pleadings. The court sustained the objection, and the defendants excepted.

The defendants further offered to show the title of the goods in *Adler & Shiff*, in mitigation of damages; to which offer the plaintiff objected, for the reason that such title was not alleged in the answer, and that the evidence was offered in mitigation of damages, whereas it should have been offered by way of defense. The court sustained the objection, and the defendants excepted. The defendants further offered to prove that the title to the property in question was in *Adler & Shiff*; that *Fenton, Lee & Co.*, being creditors of *Adler & Shiff*, caused the property to be seized by virtue of an attachment, and took the same out of the possession of the plaintiff, and that the same was sold according to law, and the proceeds applied to the proper payment of *Adler & Shiff's* debt, due to said *Fenton, Lee & Co.* This offer was objected

to by the plaintiff; the court sustained the objection; and the defendants excepted.

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The defendants further offered to give in evidence the order of attachment against the person of *Solomon Adler*, being a part of the record aforesaid; to which the plaintiff objected, and the court sustained the objection, and the defendants excepted.

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Thereupon the defendants, by their counsel, moved for leave to amend their answer by adding certain allegations, which were, in effect, that all the title of the plaintiff to the store, merchandise, &c., mentioned in the complaint, was under and by virtue of the assignment above described, made to him by *Joseph H. Adler* and *Lewis Schiff*, and that the said assignment was fraudulent and void as to the creditors of said *Adler & Schiff*, &c. The court refused to allow the amendment, on the ground that it set up an entirely new and different kind of defense; to which ruling of the court the defendants excepted.

After the case had been submitted to the jury by the parties, the plaintiff moved to discontinue as to the defendant *Cogswell*, which was granted; and thereupon the court, among other things, charged the jury as follows:

"In regard to the second cause of action, the complainant alleges that he was arrested and held in custody two hours. In considering this, I will also consider the third cause of action. In regard to these, I think that under the whole of the pleadings, you are justified in finding a general verdict against the defendants. They have all justified, and I think none of them can now deny their part in the acts complained of, having in their pleadings avowed them. If you find from the evidence that the arrest was made and the store taken as alleged in the complaint, I suppose there is no doubt, under the pleadings and proof, that you will find a verdict for the plaintiff on these two causes of action. As to the damages, if you find for him, you will give him full and fair compensation. You can also give him exemplary damages for the wilful and malicious arrest, if you find that the arrest was wilful and malicious. These damages are called exemplary or punitive, and are allowed in this sort of an action,

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but only where the trespass complained of is malicious and wilful. In this case the arrest was made under a writ of attachment against the plaintiff, issued out of a court. I have decided that the writ improperly issued, and affords no justification to the defendants. If you find that this writ was obtained by the defendants maliciously and wilfully, you can give such damages as I have called exemplary or punitive. If it was not obtained maliciously and wilfully, but by innocent mistake, you are not at liberty to give such damages."

To which charge of the court, and every part thereof, the defendants excepted.

The court further charged the jury: "If you find the defendants guilty of dispossessing the plaintiff of his store, then you can find compensatory damages, and also exemplary damages, if you find it was maliciously done." To which charge the defendants excepted.

The defendants then asked the court to instruct the jury as follows: "In order to entitle the plaintiff to recover, in this suit, against all the defendants, for a forcible and wrongful arrest of the plaintiff, as set forth in his complaint as the second cause of action, the jury must find, from the evidence, that all the defendants aided and assisted in such arrest; and there is no evidence in the case implicating any of the defendants but *Duncan C. Reed*." This instruction the court refused to give; to which refusal the defendants excepted.

The court further charged the jury: "That if they found that the arrest was made wilfully, they had a right to give damages as a punishment to the defendants, for the purpose of making an example, and as a warning to them and others, in addition to the damages which were a compensation for the plaintiff's injuries, and that the complaint alleged four thousand dollars damages for the arrest, and four thousand dollars damages for the goods, and that in estimating the damages for the arrest, they could give anywhere from six cents to four thousand dollars, but that they might, in making their estimate of damages, take into consideration the fact that it was done under color of law." To which charge the defendants excepted.

The jury brought in a verdict for the plaintiff, in which

they assessed the value of the goods at \$3,363.50, with interest at 7 per cent.; damages on the arrest, \$1,000. The defendants objected to the entry of judgment upon the verdict. The court directed the jury to again retire, and put their verdict in a gross sum, and the defendants excepted to the order. Afterwards the jury came into court, and returned a verdict for the plaintiff, assessing his damages at \$4,625.67. The defendants objected to the reception of this as the verdict of the jury, for the reason that the jury had before returned a verdict into court, which, upon being called, they declared was their verdict, and that the present verdict was different in substance from the former. The court overruled the objection, and the defendants excepted.

Motion for a new trial overruled, and judgment entered upon the verdict, from which the defendants appealed.

Finches, Lynde & Miller, for the appellants, contended that the evidence offered to show that *Solomon Adler* had no title to the goods, &c., and that the assignment by *Adler & Shiff* to him was fraudulent as to creditors, was admissible, and cited *Williston vs. Jones*, 6 Duer, 504; *Hunter vs. Hudson R. Iron & M. Co.*, 20 Barb., 493.

As to the admissibility of the transcript of the record of the U. S. district court, their argument was substantially as follows: 1. *The district court of the U. S. for the district of Wisconsin has power to issue writs of attachment.* It has issued them ever since its organization. Its rules have, from time to time been adopted with reference to the law of this state in such matters. Its rule on this subject at the time when the attachment in question issued, was as follows:

"Rule 6. Attachments may be allowed by the judge or a commissioner of this court, upon the terms required by law. A clause of attachment will be inserted in the summons. But if an attachment is allowed after the service of the summons, the summons may be omitted or issued as an alias summons. The writ will be issued according to the præcipe. The law of the state in force at the time, and its remedies on this subject, will be enforced in substance."

The district court had a right to adopt by rule, as a part of its process and proceedings, the attachment law of the

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state. *U. S. Bank vs. Halstead*, 10 Wheat, 51; *Wyman vs. Southard*, id., 1; *Beers vs. Haughton*, 9 Peters, 359; *Boyle vs. Zacharie*, 6 id., 635; *Keary vs. The Farmers' and Mer. Bank*, 16 id., 94; *Duncan's heirs vs. United States*, 7 id., 435; *Fullerton vs. Bank of U. S.*, 1 id., 604; *Mills vs. Bank of U. S.*, 11 Wheat, 431; *Ely vs. Hanks*, February No., 1859, of Western Law Monthly, 107; 1st U. S. Stat. at Large, pp. 73, 77, 93, § 17, and p. 83; 4th id., 278; 9 id., 56 and 233; 9 id., 213. Counsel called the attention of the court specially to the statute of March 14, 1848, last cited, and to the construction put upon the same by the U. S. district court for the district of Ohio, in the case of *Ely vs. Hanks*, above cited. To the objection that the state attachment law can not be adopted by the district court, because the marshal cannot bring suit in that court in his own name, upon notes and accounts due the defendant in the attachment suit, in the same manner as the sheriff is required to bring suit in his own name upon such evidences of debt in an attachment suit commenced in a state court, counsel replied that the law does not require the sheriff to bring his suit in the same court in which the attachment is commenced, and the marshal might, therefore, bring his suit in a state court.

2. *There was no failure to obtain jurisdiction in this case, from any defect in the form of the writ.* It is said that because an attachment clause is inserted in the original summons, we have made a new writ, unknown to the common law, and, therefore, the summons and attachment is a nullity, and the district court had no jurisdiction. But the summons is not destroyed, because it contains more than is necessary for a summons. *Toland vs. Sprague*, 12 Peters, 330. As to the warrant of attachment, it would not have been void if pasted on the back of the summons, nor was it any violation of law to include it in the summons. The law only provides, that a "warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge or court commissioner;" and that it "may be obtained at the time of issuing the summons, or at any time afterwards." It prescribes nothing in regard to its form. The district court, as already shown, had a right to prescribe its

form; and the question of form is one of practice merely, and does not involve a question of jurisdiction.

3. *The record presents a proper case for the issue of the writ.* It shows that every requisition of the attachment law was complied with. The affidavit was made, the order allowing the attachment obtained from the judge of the court, and the bond given. The bond was legal; it was *good on its face*, and could not have been questioned even on a motion to quash the attachment. 6 Smedes & Marsh., 276; Rule 2, Additional Rules of U. S. Court.

Brown & Ogden, for respondent, contended that the offer of the defendants to show an assignment to the plaintiff by *Adler & Schiff*, and that the assignment was fraudulent, was in direct conflict with their answer, and properly overruled. *Eaton vs. White*, 2 Wis., 292.

Counsel also contended that the court properly rejected the offer, by the defendants, of the entire record above described; for the reasons, 1st. That the answer of the defendants set up only the writ, relying upon that for protection, and the other proceedings were, therefore, immaterial; 2d, That under the order of the court, the officer could not execute the writ until the bond was given, and the instrument filed as such was no bond, as to several of the parties, because their names are signed by *Merrit T. Cole*, without any authority given him so to sign being filed or shown. *McCarty vs. Gage*, 3 Wis., 404. 3d. That the materiality of the record depended upon its connection with proof of title in *Adler & Schiff*, which proof was inadmissible under the pleadings. 4th. That the district court had no power over the property until it had first gained jurisdiction over the person by service of the summons, and that it appears from the return of the officer, that the attachment was made several days before the service of the summons. 5th. That the district court has no jurisdiction, in any case, of the writ of attachment as a mesne process. On this last point counsel argued as follows:

The powers of the district court of Wisconsin are derived solely from the act of congress which provides for the admission of Wisconsin into the Union. Revised Statutes, p.

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June Term, 1860. 1082, sec. 4. This act confers upon that court the same powers as are conferred by the judiciary act of 1789 upon the judge of the district court of Kentucky. The process act of 1789 is entirely distinct from the judiciary act, and the provisions of that and the several subsequent process acts do not apply to the district court of Wisconsin. The process act of 1789 simply authorized the adoption by the United States courts *then* in existence, of the process *then* used by the supreme courts of the several states *then* in the Union. U. S. Stat. at Large, vol. 1, p. 92, § 34; *id.*, p. 93, § 2. This act was merely continued by that of 1792. *Id.*, p. 276, § 2. These acts have received an interpretation in several cases in the United States courts. *Toland vs. Sprague*, 12 Peters, 300; 5 Mason, 35; *Wyman vs. Southard*, 10 Wheat, 1; Peters' C. C. Rep., 1; *Ross vs. Duval*, 13 Peters, 60. In 1828 congress passed a law applicable to those states admitted subsequently to Sept., 1789, and before 1828, (and therefore to Kentucky, which was admitted in 1792,) giving the power to adopt, with such alterations as the several United States courts might deem necessary, the state process *then* used; and, as to executions, &c., the power to change their rules from time to time, so as to conform to the state law. U. S. Stat. at Large, vol. 4, p. 278. Another act was passed in 1842, applying the provisions of the law of 1828 to states admitted up to the date of the act. Stat. at Large, vol. 5, p. 499. It is important to remark, that in regard to the power of the supreme court to make alterations in process, the words "*from time to time*" are used, but not as to circuit and district courts. If then this were the district court of Kentucky, to whose powers those of the Wisconsin district court are limited, we should say it had no jurisdiction to create, as a modification of the state law, the writ in question; 1. Because the power of the court (except in reference to *final* process,) was to adopt the state process with modifications; and having once adopted them, its power was exhausted. 2. Because the process to be adopted was such as was used at the date of the passage of the act. This is fully explained in some of the cases above cited. 3. Because the original process used by the state courts was merely a summons, and

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this is a new writ. 4. Because the proceedings under an attachment in the state courts are entirely inapplicable to the United States courts. The title to the property of, and debts due to the defendant become changed, and the sheriff has the right to sue for and recover in his own name, both property and debts. How could the marshal proceed against citizens of the same state in the United States court? The whole law could not be adopted, and consequently no part could. *McCracken vs. Hayward*, 2 How., 608. 5. Because the power of the United States courts, by the acts of congress, was to adopt and modify the form of process, not to create new rights. Attachment on *mesne* process, and the consequent sequestration of property, is a new right given to a litigating party, a rule of property for the time being, and not a mere form of proceeding. The creation of such a right in behalf of the plaintiff, is an exercise of the highest and most delicate power vested in the legislature, and congress neither did nor could vest such power in any judge or court; nor could the state legislature transfer its own authority to another body.

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By the Court, DIXON, C. J. The main question in this case, is whether the United States district court for the district of Wisconsin has the power by rule to adopt, and, in the cases provided by law within this state, to issue, in common law actions commenced or pending in that court, process of attachment against the property of debtors, as a provisional remedy, according to the form and mode of proceeding prescribed by the Code of Procedure. After its enactment, that court, by a general rule, adopted its provisions on that subject, and ordered that attachments might be allowed by the judge or a commissioner, upon the terms required by law, a clause of attachment being inserted in the summons: or in case of an attachment allowed after the service of the summons, that the summons might be omitted, or an *alias* issued; and that the law of the state in force at the time, and its remedies on the subject, should be observed in substance. As the other questions involved in the case spring from this, we shall not discuss them. Like all other questions touch-

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ing the powers of the federal courts, no question under the constitution of the United States being made, it depends upon the construction to be given to the several acts of congress in relation thereto. The power of congress to confer the jurisdiction sought to be impeached is not denied, and the only question is, has congress done so? Questions of this nature are not of frequent occurrence in this court, and as we have been referred to no adjudications of the supreme court of the United States, which in our opinion reach the point in controversy; and as we are not, we regret to say, sufficiently familiar with the decisions of the learned judge of the district court, if indeed he has had occasion to pass directly upon the question, to know upon what laws of congress he rests the power, we are compelled to a great extent to determine it upon our own construction of those laws. If by the decision of the supreme court of the United States, a construction had been given to any of the acts of congress, by which it was held that the power exists in the district court, we should feel bound by such decision, and be relieved from any examination of the subject. There being, to our knowledge, no such construction by that court, we must interpret for ourselves.

If, in our opinion, the exercise of this power by the district court depended solely upon that clause of the 4th section of the "act to enable the people of Wisconsin territory to form a constitution and state government, and for the admission of such state into the Union," approved August 6th, 1846, (9 U. S. Stat. at Large, 56,) which declares that the judge of the district court "shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled 'an act to establish the judicial courts of the United States,' " and which alone, in connection with the judiciary and process act, was cited and relied upon by the counsel for the appellants, we confess we might find some difficulty in upholding it. Nevertheless we are not prepared to say that it might not in that view be sustained; nor that it would be an unwarranted construction of the 14th section of the judiciary act, to hold that the courts organized under it, might

without the restrictions imposed by the process acts, from time to time modify or change the remedy by attachment, agreeably to the principles and usages of the laws of the states within which they are held, at the time such modifications or changes were made. The reasoning of the supreme court in *Wyman vs. Southard*, 10 Wheat, 1, and *U. S. Bank vs. Halstead*, id., 51, as we may hereafter have occasion to notice, tends strongly to support this conclusion, though the question was not directly before it.

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The process acts cited and relied upon, are the temporary law of September 29, 1789, which was pending before congress at the time of the passage of the judiciary act, and the act of May 8, 1792 (U. S. Stat. at Large, 275), by the 2d section of which the temporary law, with certain modifications and reservations of power on the part of the courts, was continued and made permanent. We were also referred to the act of May 19, 1828 (4 U. S. Stat. at Large, 278), and that of August 1, 1842 (5 U. S. Stat. at Large, 499), by the former of which the provisions of the prior acts in relation to process, were extended to those states which had been admitted since the 19th of May, 1828. These latter acts, however, except so far as they evince a clear intention on the part of congress to continue in force throughout all the states of the Union, the provisions of the original process act, as made permanent, thus making the form of writs, executions and other process, except their style, and the forms and modes of proceedings in suits at common law, to correspond with those in use in the several states, seem to have no particular bearing upon the question we are considering. The second section of the act of 1789 enacts, "that until further provision shall be made, and except where by this act, or other statutes of the United States, it is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

The act of 1792, continuing and making permanent that of 1789, provided, that "the forms of writs, executions and

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other process, and the forms and modes of proceeding in suits in those of common law," should be the same as *then* used in the said courts respectively, in pursuance of that act, "except so far as may have been provided for by an act to establish the judicial courts of the United States, *subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same.*"

Viewing the question in the light in which the argument of the counsel for the appellants placed it, namely, that the jurisdiction and powers of the district court of Wisconsin are derived solely from that clause of the 4th section of the act to enable the people of the territory of Wisconsin to form a constitution and state government, which we have above quoted, it seems very evident that all the above mentioned acts concerning the forms of writs and process, and the forms and modes of proceeding in the federal courts, are entirely out of the case. They were all enacted after the passage of the judiciary act, by virtue of which the district court of Kentucky was organized. In it no reference was or could have been made to them. The language is plain and unambiguous, and limits the powers and jurisdiction conferred to such as were given to the district court of Kentucky by the judiciary act. Argument is useless to prove that authority given to the district court of Kentucky by other and subsequent acts of congress, is not by this language conferred upon the district court of Wisconsin. Such a construction cannot be maintained. Hence the authorities cited, which establish that the circuit court and other district courts of the United States, have the power, by rule, to adopt the forms of process in use in the several states in which they have jurisdiction, are inapplicable in this view of the matter, for the reason that they are all based upon the provisions of the 2d section of the act of 1792, which subjects them to "such alterations and additions as the said courts respectively shall, in their discretion, deem expedient." We are, therefore, to look to the judiciary act to ascertain what powers

are conferred by it upon the several courts thereby established.

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By the 10th section, the district court in Kentucky, beside the jurisdiction thereby given to the district courts, was declared to have jurisdiction of all other causes, except of appeals and writs of error, thereafter made cognizable in a circuit court. The 14th section enacts, "that all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." These are all the provisions of that act bearing upon the question as viewed by counsel. We were referred to the last clause of the 17th section, which declares that "said courts shall have power to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States;" but as the supreme court has decided (*Wyman vs. Southard, supra*) that this section is confined to business actually transacted in court, and does not contemplate proceedings out of it, it has no application here. As we are not, however, compelled to decide the question upon the theory of counsel, and since we are clearly of opinion that there is another clause in the 4th section of the act of 1846, which does confer upon the district court this power, it becomes unnecessary for us to say whether, in our opinion, it would, or would not have it under the 14th section. There is much reason for saying, that by a fair construction of its language, and by the effect which has been given to it by the decisions of the supreme court, it does give the power. It is to be observed, that it is this section which gives to the federal courts their power to issue process. The process acts prescribe the forms of processes, but confer no power to issue them. They are merely limitations upon the power here given. They restrict it, by prescribing in what manner it shall be exercised. Without them, the courts would be at liberty to select among all the forms of process, which are *agreeable to the principles and usages of the law*, such as best suited

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their taste or convenience, without regard to such as were in use in the states in which they respectively had jurisdiction.

It was to restrain this otherwise unlimited choice in the forms and modes of proceeding which prevailed in the various states, and in which they all differed more or less, that these acts were passed. Such is the interpretation of the supreme court in the cases above cited. If this be so, it would follow that the district court of Wisconsin, without some other provision bringing it within the restrictions, would possess more enlarged powers upon the subject of process, than the district and circuit courts of an earlier date, to which the restrictions do apply. It could issue processes agreeably to the principles and usages of the law in any of the states, whilst they are confined, without some special rule, to such as are used in the states in which they preside. Nor would it be confined to such writs as were used at the time of the passage of the act; for the law, being permanent in its nature, and intended to operate for all future time, or until it should be modified or repealed, would be held to apply to such principles and usages of law as are known at the time of their issue, and would not be limited to such as were known at the time of its enactment. It has no such words of limitation as the original process act. Therefore, the argument of the respondent's counsel, drawn from the word "now," as used in that act, is inapplicable.

It was urged that the writ of attachment could not be issued under this section, because it was not "*necessary*" to the exercise of the jurisdiction of the court; that all its powers could be exercised without it. It is true, that for the purpose of obtaining jurisdiction of the person, and enabling the court to pronounce a valid judgment, it may be dispensed with; but in many cases, for the purpose of accomplishing justice, which is the end sought by litigation, it becomes absolutely necessary. It was undoubtedly the intention of congress to place in the hands of the courts those means which are usually resorted to for the purpose of attaining the objects for which their powers are invoked; and to hold to this narrow construction, would be to defeat this intent. It is a process of peculiar importance, and in many

cases so indispensably necessary, that the judicial power cannot be beneficially exercised without it. Giving to the word "necessary," as here used, the meaning which commonly attaches to it when employed to confer power, it must be held to give authority to issue the writ. Under our system of jurisprudence, such a remedy, though not perhaps strictly indispensable, is certainly *needful* and *conducive* to a proper discharge of the duties of a court of general and original jurisdiction.

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It was also urged, that the proceeding by attachment was not then known to the law, and that the qualifications of the power under the terms "agreeable to the principles and usages of the law," limited it to such writs as were sanctioned by the principles and usages of the common law. Although the writ of attachment may not be said to be a common law writ, yet it is a very great mistake to suppose that it was not known to the law, at the time of the passage of the act. On the contrary, a very slight investigation will satisfy any one, that it is a proceeding of very great antiquity, its origin being ascribed by some to the Roman law; and that it was not only well known and in general use in the several states at the time of the adoption of our federal constitution, but that it was in like manner known and used by our colonial ancestors long prior to the revolution. Drake on Attachment, chap. 1. This is proved, in part, by the act itself, in the 12th section of which the proceeding is mentioned. To the argument, that the power is confined to such writs as were sanctioned by the common law, it is a sufficient answer to say that the supreme court have decided differently, and held that it was intended to authorize writs sanctioned by the principles and usages of the state laws. *U. S. Bank vs. Halstead*, *supra*, page 56. But this discussion may perhaps be considered not pertinent, as we have decided the case upon another ground, which we will proceed to state.

By the 1st clause of the 4th section of the act of 1846, to enable the people of Wisconsin Territory to form a constitution, &c., it is enacted: "That from and after the admission of the State of Wisconsin into the Union, in pur-

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suance of this act, the laws of the United States which are not locally inapplicable, shall have the same force and effect within the state of Wisconsin, as elsewhere within the United States." This language is too plain for comment. The act of 1792 is not locally inapplicable to this state, and hence by this clause its provisions are extended to the district court. It is a general law, applicable alike to all parts of, and to all the courts in, the Union. By virtue of its being thus extended over this state, the district court had the power, by rule, to adopt the process in question. Otherwise we do not see how any of the vast body of laws, concerning the practice and modes of proceeding in the federal courts, which have been enacted since the passage of the judiciary act, and which constitute the principal part of congressional legislation upon that subject, are to be considered applicable to the district court. They clearly would not be. Such construction would only be consistent with an intention on the part of congress not to make them so, but to leave that court with only such meagre regulations as are made by the judiciary act, or were in force at the time of its passage, which no one can for a moment believe. On the contrary, an opposite intention could hardly have been more plainly evinced. This clause was used to give effect, in Wisconsin, to all laws of a general nature; the other, to declare to what controversies or actions the jurisdiction of the court should extend.

It follows from these views that the judgment of the circuit court must be reversed, and a new trial awarded.

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A motion for a rehearing having been made in this case, we have carefully reviewed the grounds of the foregoing opinion, and still believe them to be correct. The motion must therefore be overruled. Upon the admissibility, under the averments of their answer, of evidence on the part of the appellants going to show fraud or bad faith in the transfer of the property by *Adler & Shiff* to the respondent, a question upon which it is said we ought to have passed but did not, we say that we think the answer lays a sufficient foundation for it, and that on that account it ought not to be

excluded. The answer alleges that the goods and chattels were, at the time of their seizure by virtue of the writ of attachment, the property and effects of *Adler & Shiff* the defendants therein named, and liable to attachment and execution by their creditors. This is a sufficient averment of title or property in *Adler & Shiff* to enable the appellants to establish it by any means in their power; and within the doctrines of this court in *Gillett vs. Robbins*, decided July 30th, 1860, a more particular statement of facts as to how they became the owners originally, or how they continued to be the owners, their title and property having once been admitted or established, was unnecessary. Such detailed statements of title, or facts going to show it, would often be very inconvenient and difficult, and sometimes wholly impracticable or impossible.

Judgment reversed, and a new trial awarded.

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Before the public can acquire the right to enter upon, and permanently occupy land which may be needed for its use, against the will of the owner, the value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid to the owner; or if not paid to, or received by him, an adequate and safe fund must be provided, from which he may, at some future time, be compensated.

In the case of a private corporation, like a railroad company, this principle would require it to tender in money the ascertained damages or compensation, with expenses, if any, to the owner or person interested, and if he should refuse to receive it, to deposit the same with some proper person, to be kept for the owner until he shall apply for it.

Norton vs. Peck, 3 Wis., 714; *Shepardson vs. M. & B. R. R. Co.*, 6 Wis., 605; and *Robbins vs. M. & H. R. R. Co.*, id., 636, cited and approved.

A statute provided that a railroad company, before seizing and appropriating the land of others to its own use, should, by its agent, first offer to pay to the owner or owners, the sum which such agent and two disinterested freeholders of the county where the lands are situate, should, on oath and in writing, swear to be a just compensation for such land and damages: *Held*, that such a proceeding to ascertain the value of land so to be appropriated, is not a compliance with the requirements of the constitution.

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A tender to the owner of land, of a compensation assessed in the mode prescribed by that statute, which he refused to accept, did not give the railroad company the right to appropriate the land to its own use, and an injunction was properly granted, to restrain such company from the further occupancy or appropriation of said land.

The commissioners to value the land in such case, and ascertain the damages sustained by the owner, should be impartial men, indifferently chosen or appointed between the parties, and their investigation open and known to both parties, giving to each an opportunity to be heard, and to offer such evidence as may be proper.

APPEAL from the Circuit Court for *Winnebago* County.

Complaint to restrain the defendants from digging up the soil, and making excavations and embankments across a tract of land belonging to the plaintiffs, which, it is alleged, the defendants, who are insolvent, have without color of right, commenced doing, and are threatening to proceed with, so as to hinder the free passage of the plaintiffs from one part of their said land to the other, rendering the part so appropriated to such excavations and embankments entirely worthless to the plaintiffs for agricultural purposes, for which it was used by them, greatly deteriorating the value of the remainder of said land, and doing them an irreparable injury. Prayer, for a perpetual injunction on the final hearing, and, in the meantime, for a temporary injunctional order, restraining the defendants from the further commission of such wrongs.

Upon the filing of this complaint, which was duly verified, the county judge of Winnebago county granted a temporary injunctional order, in accordance with the prayer of the complaint.

The defendants answered, that they lawfully entered upon the plaintiffs' land, as the employees of the Sheboygan and Appleton Railroad Company, a corporation duly organized under the law of the state of Wisconsin, entitled "An act to incorporate the Sheboygan and Appleton Railroad Company," approved March 29th, 1855; that before they entered upon any part of said land, the said company caused the portion so entered upon (being four rods wide, and sixty rods more or less in length), and the damages to be sustained by the plaintiffs from its appropriation, to be duly appraised

according to law, by an agent of said company and two dis- June Term,
interested freeholders of the county in which the land is 1860.
situate, who did, on their oaths, declare in writing, that they POWERS et al.
had examined said piece of land so appropriated by said com- V.
pany, and that the just compensation to the owners of said BEARS et al.
land, for the same and for the damages sustained by them,
amounted to the sum of \$100; that after the making of said
appraisal, and before the entry upon said parcel of land by
the defendants, the said railroad company duly tendered to
the plaintiffs the sum of \$100, the amount so awarded them
by said appraisers for said parcel of land, and the damages
aforesaid; that the defendants did not enter upon any por-
tion of the plaintiffs' land, except the strip so appropriated
and appraised, and were lawfully at work thereon, prepar-
ing the ground for the track of said road, doing the plain-
tiffs no unnecessary damage. They also denied that they
were insolvent, and insisted, as a defense to the action, that
the plaintiffs had a full and adequate remedy at law for their
supposed grievances. The answer was also verified.

The appraisement referred to in the answer is as follows:

STATE OF WISCONSIN, } ss.
County of Winnebago.

We, James V. Palmer, agent of the Sheboygan and Appleton Railroad Company, and G. P. Vining and A. M. Thoms, disinterested freeholders of the county aforesaid, being duly sworn do depose and say, that we have examined a certain piece of land in the town of Oshkosh, in said county, situate in the s. e. qr. of sec. 13, owned, or claimed to be owned, by Franklin M. Powers and Herman G. Powers, which has been appropriated by said railroad company, under and by virtue of its charter; said piece being four rods in width, and forty rods more or less in length, and containing one and a half acres, more or less; and that the just compensation to the owner of said land for the same, and for the damages sustained by him, amounts to the sum of one hundred dollars. For a more particular description of said land,

June Term, 1860. reference is hereby made to the maps and other documents of said railroad company.

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JAMES V. PALMER
GORHAM P. VINING.
A. M. THOMS.

Subscribed and sworn to before me, this 16th day of
November, A. D. 1859.

C. COOLBAUGH, Notary Public, Wis.

A motion was made before the judge of the Winnebago circuit court, to vacate the injunctive order which had been granted by the county judge, upon the following grounds: 1st. Said injunction suspends the ordinary and general business of a corporation, and therefore the county judge was not authorized to grant the same. 2d. The complaint shows upon its face that the plaintiffs had a full and adequate remedy at law, and therefore the action is improperly brought. 3d. The answer shows that no rights of the plaintiff have been invaded or disturbed illegally. 4th. The answer denies all the equities of the complaint, and all the allegations therein upon which an injunction could have been granted. 5th. Said proceedings are in other respects irregular, &c.

Upon the hearing of this motion, several affidavits were read. The affidavit of *Franklin M. Powers*, one of the plaintiffs, stated that he had never received any information or notice of the location of the Sheboygan and Appleton Railroad across the land of the plaintiffs until one Dwight showed him the affidavit of the appraisers, and that when said Dwight offered him the amount of said appraisement, he did not know what land the company desired to take, nor was he informed for what land the money was offered; that he was not present at the time of said appraisal, nor did he select or agree upon, nor was he requested to select or agree upon any appraiser of said land; that he believes the damage to the plaintiffs resulting from the location of said railroad across said land, amounts to at least \$1,500; that the defendants are strangers and have no visible means or property known to him.

Several other affidavits, by disinterested persons, were read, in which the value of the strip sought to be appropriated for the railroad track through the plaintiff's land, was variously estimated at from \$375 to \$450, and the damage resulting to the plaintiff from the location of said railroad across their land, at from \$1,000 to \$1,650.

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The affidavit of one Doe was also read on the part of the plaintiffs, stating that the defendants were reputed to be partners in the building of said railroad, and that the defendant *Bears* had told the affiant, since the commencement of their work on said road, that Wm. B. Ogden and Perry H. Smith were the paymasters of said defendants for said work.

The affidavit of Timothy Dwight was read on the part of the defendants, showing that, on the 16th day of November, 1859, he tendered to *Franklin M. Powers*, in payment for the strip of land described in the appraisalment hereinbefore mentioned, the sum of \$100, and that *Powers* refused to receive the same and execute a deed of the land to the Sheboygan and Appleton Railroad Company.

The circuit court made an order vacating the injunction, from which the plaintiffs appealed.

Bouck & Edmonds, for appellants :

1. The complaint shows a proper case for a temporary injunction. *Kerlin vs. West*, 3 Green's Ch. Rep., 449; *Hart vs. The Mayor, &c.*, 3 Paige, 213; *Spear vs. Cutter*, 5 Barb., 486; *Johnson vs. White*, 11 id., 194; *Coulson vs. White*, 3 Atk., 21; Story's Eq. Jur., §§ 926-7; *Attorney General vs. Hunter*, 1 Dev. Eq., 12; Jeremy's Eq. Jur., 312; *Ingraham vs. Dunnell*, 5 Met., 118; Mitf. Pl., 3 ed., 111.

The Appleton and Sheboygan Railroad Company had no right to enter upon the lands along their route and construct their road, without the consent of the owners, or without first paying, or securing the payment of a just compensation. *Robbins vs. M. and H. R. R. Co.*, 6 Wis., 636; *Shepardson vs. M. and Bel. R. R. Co.*, id., 605; *Norton vs. Peck*, 3 id., 714; *Weeks vs. The City of Mil.*, 10 id., 242. See also *Doty vs. S. and E. R. R. Co.*, 3 Halsted Ch. R., 61; *Bloodgood vs. The M. and H. R. R. Co.*, 18 Wend., 9; *Keene vs. The*

June Term, 1860. *Borough of Bristol*, 26 Penn. St., 46; *Gardner vs. The Village of Newburgh*, 2 John. Ch. Rep., 162.

POWERS et al. v. BEARS et al. 2. The answer of the defendants is not evidence at all, as such, and is used on a motion to dissolve an injunction only by reason of its being verified so as to make it an affidavit, and as such it has the same force as the verified complaint. *Hascall vs. Madison University*, 8 Barb., 174-176; *Malcolm vs. Miller*, 6 How. Pr. R., 456; *Schoonmaker vs. The Reformed Dutch Church*, 5 id., 265.

3. The county judge had a right to grant the injunction. The acts complained of and those set up in the answer, are not the general and ordinary business of the corporation. To be such they must be authorized by law. Moreover the corporation is not enjoined, and the fact claimed by the defendants, that they are employees of the corporation, is disputed. The defendants cannot avail themselves of the right of a third party to defeat the injunction. Besides, in *Shepardson vs. The M. and Bel. R. R. Co.*, *supra*, an injunction restraining the corporation from building their road, was granted by a court commissioner, and his action was sustained by this court.

Wheeler & Coolbaugh, for respondents:

1. The mode of ascertaining the damage to the owners of the land, by commissioners appointed by courts, is not repugnant to the constitution. 3 Paige Ch. R., 45. Such condemnation is not unconstitutional, provided the charter of the corporation requires compensation to be made to the owner of the land taken by it. *Bloodgood vs. M. and H. R. R. Co.*, 14 Wend., 52; 18 id., 9; *Smith vs. Helmer*, 7 Barb., 416; Pierce on Am. R. R. Law, 152. The payment of such compensation need not precede the entry upon the land by the company. It is enough that provision is made for its payment. 18 Wend., 9.

Section 2 of chapter 168 of the General laws of 1859, directs the manner in which railroad companies may proceed to determine the value of land and the damages sustained by its appropriation, and authorizes a tender of the amount of the appraisement. If such offer be refused, then either party may apply to any justice of the supreme court or circuit

judge, in term time or vacation, for the appointment of commissioners, &c. In *Shepardson vs. M. and Bel. R. R. Co.*, 6 June Term, 1860. Wis., 605, the law under which the railroad company proceeded, was held unconstitutional because it provided that only the company could make the application. The act of 1859 above referred to, is not liable to that objection. Sec. 3 of the same chapter provides, that the tender contemplated in the 2d section, shall be the commencement of the proceedings in all cases, (where the parties shall not otherwise agree,) and that all subsequent proceedings shall be conducted as above provided. Sec. 12 of the charter of the S. & A. Railroad Company provides, that said company shall have full power and authority, pending all proceedings to condemn land for their use, and until they shall refuse to pay, &c., "to use, occupy and enjoy the peaceable and uninterrupted possession of such lands, for all the lawful purposes of such corporation, and they shall not, while such proceedings are pending, nor until such refusal, be disturbed in such possession, use, occupation or enjoyment, *by any proceeding, either in law or in equity.*"

2. Equity will not interfere by injunction in case of a naked trespass where there was a full remedy at law. 3 Green Ch. Rep., 449; 6 Ohio, 166; 7 John. Ch. Rep., 315. The act complained of, as set forth in the complaint, is only a naked trespass. It is only when the wrong is irreparable, that courts will interfere by injunction. 1 A. K. Marsh., 554; 9 Wend., 570; 2 id., 162 and 463; 6 id., 500; 2 Waterman's Eden, 226, note 1, 3d ed. Where the answer, as in this case, fully denies the equity of the bill, the practice is to dissolve the injunction. 4 Paige, 111; 5 id., 112.

3. Courts will not, on a preliminary motion, restrain the acts of a corporation which are within the scope of its charter.

4. This injunction suspends the general and ordinary business of a corporation, and therefore, the court commissioner had no power to grant the same.

By the Court, DIXON, C. J. We do not feel called upon in this case to enter into a discussion of the question, as to the time when the owner of private property taken for public

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use shall be compensated therefor, to which counsel devoted much attention, and the repeated and thorough examinations of which by the courts of our sister states, have produced a variety of conflicting and irreconcilable opinions and decisions, for the reason that we regard it as substantially settled, in a manner entirely in harmony with our own views, by the former adjudications of this court. In the case of *Norton vs. Peck*, 3 Wis., 714, it was held that the officers of a town could not enter upon and appropriate to public use the land of an individual, required for a highway, unless compensation therefor was first made, or unless proper proceedings were first taken by the authorities of the town to ascertain its value, so that he could receive it when called for. In that opinion the court say, that in the case of land taken by the authorities of a town, they do not decide that actual prepayment of the damages in money is necessary, for the reason that the entire taxable property of the town constitutes an adequate fund to which the owner may without risk of loss resort to compel payment. In the subsequent case of *Shepardson vs. R. R. Co.*, 6 Wis., 605, the distinction between public or municipal corporations, and corporations merely private, as instruments in the hands of the legislature by which it may exercise the right of eminent domain, in respect to the fund to which the owner may resort, is particularly noted, and it is observed that although in theory the property in both cases is taken by the public, yet in the former case all the taxable property in the town is pledged for the payment of the value, while in the latter, the uncertain and oftentimes worthless responsibility of the corporations can only be looked to. In speaking of the case of *Norton vs. Peck*, the late chief justice says: "As in that case we held it indispensable that the compensation should be made for the property taken, without driving the owner to a suit at law to ascertain its value, or at least that the town authorities should proceed to ascertain the value of the land taken, before appropriating it to the use of the public, so that the owners should be able to recover its value from the property of the town, we must in this case hold that the railroad company cannot enter upon the plaintiff's land and apply it to

the use of the road, without making compensation and without taking any measures to ascertain the damages which the plaintiff has sustained by their acts." In the still later case of *Robbins vs. R. R. Co.*, 6 Wis., 636, much stronger language was used by the court. It was said that when the government "takes land, by virtue of its sovereign right and power, it is bound by the constitution to pay the value thereof, at the time it is taken." Setting to the one side the adjudications of this court upon the mill dam law, so called, which was sustained contrary to the individual convictions of all its present members, on the ground that the earlier decisions upon it had made it a rule of property which could not, with a due regard to individual interests, be departed from, we are of opinion that the cases above referred to conclusively establish that one of two things must invariably be done before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, which may be needed for public uses.

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1. The value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; or,
2. If the value thus ascertained be not paid to, or received by the owner, an adequate and safe fund must be provided, from which he may at some future time be compensated.

These, it seems to us, are the results of those cases and they are such as we should be unwilling to depart from. The latter proposition, in the case of a private corporation, like a rail road company, would undoubtedly require it to tender or offer in money the amount of the ascertained damages, or compensation with expenses, if any, to the owner or person interested, and if, on the ground of an intended appeal or otherwise, he should refuse to receive it, the company would be required to deposit the same with some proper officer or person, to be kept good for the owner until the end of the litigation, or until such time as he should apply for and signify his readiness to accept it.

With these rules, as to the requirements of the constitution, already fixed, it remains only to be determined whether the statute under which the railroad company proceeded in

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this case, and the steps taken by it to acquire the right to the permanent use and occupation of the plaintiffs' land, are in compliance with them. The statute, section 2, chapter 168, laws of 1859, provides: "The company, by its agent, shall first offer to pay to the owner or owners, guardian of the owner or agent of the owner or owners, or of any other person having any interest in such lands (as the case may be) if resident of this state, such sum as such agent and two disinterested freeholders of the county where the lands are situated, shall, on oath, and in writing, swear is just compensation for such lands and damages, before seizing and appropriating any such lands, in all cases where lands have not already been appropriated." Having complied with this provision, the company attempted to take permanent possession of, and to build and construct its road through the land in question. To prevent its so doing, the plaintiffs, who refused to receive the money offered, commenced this action against the defendants, who were the agents or contractors having charge of the work, and procured therein a preliminary injunction, which, on motion of the defendants before the court at term, was dissolved. From the order dissolving the injunction this appeal is taken. It must be very evident to every impartial mind, that such a proceeding to ascertain the value of the land to be taken, and to determine the damages which the owner shall be entitled to receive, if sustained, would be a mere evasion of the provisions of the constitution, as heretofore expounded by this court. It is open to the grossest partiality and abuse. It is *ex parte* and secret. The board of appraisers who are to sit in judgment on the rights of the parties, are chosen by one of them, in the absence and without the knowledge or consent of the other. One of its members is the agent and employee of the company, through whom it exercises its power of choosing the other two. They act without evidence, and their sessions are not public. As a proceeding to ascertain and determine the rights of the land owner, it is a mere mockery, equivalent to making one of the parties to a controversy a judge or trier between himself and his adversary, and ordaining that the trial shall take place in the ab-

sence and without the knowledge of the latter, or equivalent to saying that the railroad company may enter into the permanent and peaceful enjoyment of the land without any compensation whatever. No one will say that such a proceeding is a compliance with the constitution, or that it can be tolerated. The commissioners to value the land and ascertain and determine the damages, as contemplated by that instrument, are to be fair and impartial men, indifferently chosen or appointed between the parties, and their investigation is to be open and known to both, giving to each an opportunity to appear before them and make such statements and offer such proofs as may be necessary and proper. Until such a proceeding has been had and the corporation have complied with their award or decision in the manner above indicated, it has no right to the permanent occupancy of the land, for the purpose of constructing its road. It may also be observed that no provision is made for depositing or keeping good the money offered to the owner pursuant to such unjust and anomalous assessment. To the question as to whether a writ of injunction is a proper remedy in a case like the present, in addition to the authorities cited by the appellants' counsel, *Shepardson vs. R. R. Co.*, *supra*, is directly in point. In that case an injunctive order restraining the company from the occupancy of the plaintiff's land, and the prosecution of the work in constructing their road over the same, was dissolved by the judge at term, and on appeal to this court, the order dissolving the injunction was reversed.

The order of the circuit court must be reversed, and the case remanded for further proceedings.

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12	223
78	36
78	37
12	223
112	1590
12	223
115	1646
116	1213

A party who procures an insurance upon his own life, at his own expense, for the benefit of his infant child, as an intended gratuity or voluntary provision for such child, and afterwards becomes unwilling or unable to keep up the

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policy, by paying the required premiums, may, while the policy still remains in his own possession, transfer the same by delivery, with the assent of the insurance company, to a third person, to be kept up by him for his own benefit, he agreeing to pay the premiums thereon.

In an action by such infant against such assignee, to recover the money paid to the latter by the insurance company upon the death of the party whose life was assured, such assignee having kept up the policy until that time at his own expense, it was *held*, that the infant could not recover, although it appeared that the assignee, at the request of the parent, had signed the declaration made prior to such insurance and on which the same was based, as guardian for the infant, (though never legally appointed as such), and was described in the policy as such guardian, and had signed a receipt as such guardian, for the money paid to him by the insurance company.

APPEAL from the Circuit Court for *Racine* County.

This action was brought in November, 1858. The complaint alleges, that the plaintiff is an infant; that sometime in the year 1851, an insurance upon the life of *Margaret Ann Clark*, the mother of the plaintiff, was effected in the Mutual Life Insurance Company of New York, for the sum of two thousand dollars, for his use and benefit; that by the procurement of the defendant, the policy of insurance was made out and issued to said defendant, as the guardian of the plaintiff, although said defendant was not, and never had been, such guardian; that while said policy was in full force, on or about the 4th day of August, 1854, the said *Margaret Ann Clark* died; that on or about the 12th day of October, said defendant received from said insurance company, as the guardian of the plaintiff, the said sum of \$2,000, upon said policy of insurance, and fraudulently applied the whole of the same to his own use; wherefore, plaintiff demands judgment, &c. The defendant, by his answer, admits that said *Margaret Ann Clark* effected an insurance on her own life for the sum of two thousand dollars, as stated in the complaint, but avers that the policy was made out in his name, as the guardian of the plaintiff, without his knowledge, and was delivered to said *Margaret Ann*, who was alone the owner thereof. He also avers, that he loaned the said *Margaret Ann* the money to make the first payment on the premium, and the expenses of effecting said insurance. He admits that he has never been the guardian of the plaintiff, and alleges that about the 20th November, 1851, the said *Margaret*

Ann, then being the owner and in possession of said policy, informed him that she should no longer continue to pay the premium on said insurance, but should abandon the policy, and proposed to him, that inasmuch as he had paid all the premiums that had been paid on said insurance, if he would release her from repaying the same, and would take said policy as his own, and pay all subsequent payments thereon, she would surrender the same to him, as and for his own property; that he accepted said proposition, and thereupon said insurance policy was transferred and delivered to him by said *Margaret*; that he, in consideration thereof, released said *Margaret* from repaying to him the moneys before then paid by him for her, on account of said policy, and from that time until the death of said *Margaret*, continued to pay from his own funds, the premium on said policy, and treated the same as his own individual property, the whole amount paid by him, amounting in all to \$214,20; that said insurance company was informed of said sale and transfer of said policy to him by said *Margaret*, and assented to the same; that he was induced to take said policy for the reason that the said *Margaret* was at that time indebted to him, and to him and one *Hill* as partners, to the amount of over \$1,000, for which they had no security; and at the time of taking said policy, or soon thereafter, he agreed with said *Hill*, that he would pay the demand due to *Durand & Hill*, at the death of said *Margaret*; that said indebtedness to the defendant, and to *Durand & Hill*, has never been paid in any other manner, and that no claim therefor has been preferred against said *Margaret's* estate. He admits that in October, 1854, after the death of said *Margaret*, he received from said insurance company two thousand dollars on said policy, but avers that he received the same as his own money, and not for the plaintiff, nor as his guardian. He admits that the receipt therefor was signed by him as guardian, but avers that it was thus signed as a matter of form, that it might agree with the terms of the policy as originally issued, making no reference to the transfer thereof which had been made to the defendant, because it was more simple and easy so to transact the business, than it would have been to set

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out the transfer, with a receipt in his individual capacity.

On the trial of the action, the plaintiff introduced in evidence, a copy of the application on which said insurance was granted, which was signed, "*Margaret Ann Clark*, for her son *Henry W. Clark*," and gave the name of "*Henry Wilson Clark*, son of *Joseph G. Clark*, *Henry S. Durand*, his guardian," as the person for whose benefit her life was proposed to be assured; also a copy of the declaration made prior to such insurance, which was signed by the defendant, and read as follows: "I *Henry S. Durand*, guardian of *Henry W. Clark*, son of *Joseph G. Clark*, of *Racine, &c.*, being desirous of effecting an assurance with the Mutual Life Insurance Co. of New York in the sum of two thousand dollars, upon the life of *Margaret Ann Clark*, of *Racine, &c.*, during the whole continuance thereof, do hereby declare," &c., &c.; also a copy of the policy of insurance, which was as follows: "This policy of insurance witnesseth, that the Mutual Life Insurance Company of New York, in consideration of the sum of sixteen dollars and forty cents, to them in hand paid by *Henry S. Durand*, guardian of *Henry Wilson Clark*, son of *Joseph G. Clark*, and of the quarterly premium of sixteen dollars and forty cents, to be paid on, &c., in every year, during the continuance of this policy, do assure the life of *Margaret Ann Clark*, of *Racine, &c.*, in the amount of two thousand dollars, for the term of her natural life," &c.; and also a copy of a receipt for the amount of said policy, dated October 12th, 1854, which reads as follows: "Received, New York, 12th October, 1854, from the Mutual Life Insurance Company of New York, two thousand and forty-nine dollars and sixty-eight cents, in full for this policy and profits thereon, now cancelled by the death of *Margaret A. Clark*. *HENRY S. DURAND*, guardian, for *Henry Nielson Clark*."

The testimony on the part of the defendant, was in substance as follows: J. B. Talcott testified: "I was agent for the insurance company. *Mrs. Clark* effected the insurance, and took the policy in the name of *H. S. Durand*, guardian, for *H. W. Clark*; I think the policy was delivered to *Mrs. Clark*; the policy was presented to *Mrs. Clark*, and I think she got the money from *Durand*; I think she paid one and

a half years' premiums at *Durand's* office. After she had kept the policy one and a half years, and perhaps more, she said she would abandon it. I then saw *Durand* at her request, and advised him to keep it up for himself, and he said he would think of it; and he afterward told her he had concluded he would do so. I told him he had better have an assignment; he thought it not important to do so; I told him he could keep it up for his own benefit. She never called after that, or paid any attention to it; but *Durand* always paid the premiums after that time." On cross-examination, he said: "*Durand* was agent for said insurance company before I was, and has been agent for fire insurance companies. The policy remained as it was, in the name of *H. S. Durand*, guardian, for *H. W. Clark*, the company having no knowledge of the change. I called at defendant's office for every premium, except the first, and the policy was in his safe; was instructed to get the premiums there, and did; think I was not present at the conversation between *Durand* and *Mrs. Clark*. I cannot state to whom I delivered the policy; saw it every quarter at *Durand's* office."

Durand, the defendant, testified: "*Mrs. Clark* first spoke to me about the insurance of her life; I told her it was not best for her, because she had no means; the next I heard about it, *Talcott* came to me with the application; not long after that *Mrs. Clark* came to me for money to pay the premium, and I loaned it to her; I think she came to me the second and third time, and I always let her have it. Afterwards *Talcott* came and asked me if *Mrs. Clark* owed me. I said she did. He said, why don't you take the policy for your own benefit? I said, such women never die. A day or two after she came to me and said she had abandoned the policy, and if it was of any use to me, I might have it. Afterwards *Talcott* asked me what I had determined upon. I asked him if I could have the policy for my own benefit, by my paying the premiums? He said I could. I said I would see. I then had never seen the policy; she had always kept it. I did take the policy from *Mrs. Clark*, and paid the premiums, and kept it up till her death. She owed me between \$200 and \$400, and afterwards I loaned her \$100 more.

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She owed *Durand & Hill* between \$600 and \$700. *Hill* was uneasy as to the account, and I arranged with him that I would take the policy, and pay the *Durand & Hill* account at her death. After I assumed the policy, I never charged any premiums paid by myself; but the first premium paid by Rowley (our clerk) was charged to *Mrs. Clark* on *Durand & Hill's* books. I told him I was to pay all. Nothing was realized out of *Mrs. Clark's* estate, until 1856 or 1857. She had no property of any amount, except what was in controversy. I was the administrator of her estate; have rendered my account as such; it is not settled. I never presented my account above, or *Durand & Hill's* account against the estate, or made any claim of it. After paying all indebtedness, there is \$4,000 or \$5,000 left for the estate; there are no heirs except *Henry W. Clark*. *Durand & Hill* had a due bill against *Mrs. Clark* for about \$100. I have not settled with *D. & H.*, but have taken up that due bill. I considered my account paid, at the death of *Mrs. Clark*, by the insurance money."

J. M. Hill testified: "The firm of *Durand & Hill*, had an account against *Mrs. Clark* in 1851 and 1852, between \$500 and \$600; *Durand* said he had a life insurance, and when *Mrs. Clark* died he would pay the account; this was in 1852. Some of the premiums were entered on our books, charged to *Mrs. Clark*; I can't tell the footing of her account to-day. I did not know when the note was paid, and did not know that it was paid until to-day. I considered the account settled at the time of *Mrs. Clark's* death; do not know of any particular transactions whereby this account was paid to *Durand & Hill*."

J. B. Rowley testified: "I entered into the employment of *Durand & Hill* about six years ago, and had charge of the books; two or three months after I went there, Talcott came in for the premium. I objected to paying; I had *Durand's* business to transact; but finally paid the premium. Some two months afterwards I called *Mrs. Clark's* attention to her account. I read the items, and among the rest, the money paid for the premium. She said that was not right; she had got out the policy, but it was costing her so much she had

given it up, and told defendant he could have it and make what he could out of it, and that he had taken it, and was to pay the premiums. She said, I have not any money now to pay, don't know as I can ever pay; in case I die, it is to go to pay the account, and the balance goes to *Durand*. Some of the premiums were charged in the account; I paid the premiums, and such as were paid from *Durand & Hill's* funds, were charged in the account of *Durand & Hill*; the account was a continuation of *Mrs. Clark's*; could not tell the amount of it. I had charge of *Durand's* books. I am not certain that there was any account upon them until after her death, and that was against the estate; don't recollect seeing any account or vouchers against *Mrs. Clark* for *Durand* alone."

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The plaintiff thereupon introduced as a witness, the county judge of Racine county, who testified: That the petition for the appointment of an administrator of the estate of *Margaret Ann Clark*, was made by *Henry S. Durand*, and sworn to by him on the 8th day of August, 1854; that the petition stated that the petitioner had for many years acted as the friend, agent and guardian of said *Margaret*, and was at that time the principal creditor of the estate; that the petition for the sale of real estate, filed by the attorney of said *Durand*, on the 5th of May, 1856, stated that said *Durand* had an unsettled account against said estate, which would have to be settled by the court; and that by the final account rendered by said *Durand*, as administrator, there appeared to be in his hands, as such, over four thousand dollars, which had been invested by him in bank stock, and in notes and mortgages.

The circuit court instructed the jury substantially as follows: The plaintiff claims to recover for a policy of insurance, taken out by *Mrs. Clark*, for his benefit, and claims that he is entitled to recover the whole amount finally realized upon the policy, without any regard to the payment of the premiums, or who paid them. In answer to this, the defendant insists that the policy was in the first place, taken out at his expense, and that the entire expense of the policy was paid by him. If those who alone

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were interested in the policy, voluntarily abandoned it, and consented that the defendant might take the policy, and keep it up, and have the benefit of the same, the claim of the party thus abandoning the policy is at an end. If the party whose duty it was to make the payment and keep up the policy, surrendered it to the defendant, consenting to a delivery of the same to the defendant, for his benefit, but has failed to make the proper transfer, to enable the party who has the equitable right to the avails of the policy, to collect the same, a court of equity would afford the relief necessary to do equity. (To which the plaintiff, by his counsel, excepted, as irrelevant, and calculated to mislead the jury.) And in this case, if the jury believe from the evidence, that the policy was procured by the mother of the plaintiff, at her own expense, and of her own volition, and she for a time caused the premiums to be paid, and finally changed her mind, and concluded to, and did abandon the policy, and did surrender the policy to the defendant, to be kept up by him or allowed to forfeit, as he pleased, and if you find that the defendant did, at the request of the mother, *Mrs. Clark*, abandon all claims he then had against her, either for money advanced to procure said policy, or to keep the same up, or for any other purpose, and did take upon himself the risk of paying the premiums and keeping the policy alive, until the life of the insured was extinguished, he is equitably entitled to the avails of such policy. And whether his claim was in law sufficient to enable him to recover his equitable rights, as against the insurance company, is a question between the defendant and the insurance company. And if the company paid the money to the defendant, he may lawfully hold the same, until the plaintiff satisfies you that he, or some one for him, has so far fulfilled, or complied with the rules and regulations of the insurance company, as to secure the benefits to arise therefrom to the plaintiff (To all of which the plaintiff's counsel excepted as irrelevant, immaterial and illegal.) Notwithstanding the zeal manifested in insisting that a written assignment is necessary, and that in this case there was no legal party to assign, I must instruct you that a written assignment of a policy of insurance is not absolutely

necessary, to pass the benefits thereof to a creditor, but that this may be done by a delivery and deposit of the policy for the purpose of an assignment [which] will operate as an assignment, without a formal written assignment, and this, too, when the insured is to continue to pay and keep up the premiums. (To which the plaintiff's counsel excepted, as irrelevant, immaterial and illegal.) Any transaction which gives to a creditor of the insured a right to payment out of the insurance, will be a sufficient assignment, unless the by-laws, rules and regulations of the insurance company require something more." The plaintiff's counsel requested the court to charge, "That *Henry W. Clark* was the real owner of the policy of insurance, and that *Margaret Ann Clark* could not make any valid assignment of it," which instruction the court refused to give, and the plaintiff's counsel excepted to the refusal.

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Verdict and judgment for the defendant.

Strong & Fuller, for appellants:

1. There was no contract for an assignment sufficiently definite for a court to recognize.

2. If there ever was any such contract, it is an entirely different one from that set up in the answer.

3. If there was such a contract, it was never executed. There was no written assignment; no notice to the company of any assignment; no change of possession of the policy. The premiums, in each instance, were paid in the same manner, at the same place, and charged in the same account. There was no release of *Durand's* account, and therefore, no consideration for the assignment.

4. *Mrs. Clark* had not the legal power to assign the policy.

5. The defendant, acting as guardian, could not purchase the property of his ward.

Cary & Pratt, for respondent:

The verdict of the jury in this action, has determined that the insurance was effected by *Mrs. Clark* on her own life; that she took and controlled the policy; that after making several payments, she refused to pay any more, and abandoned it; that she then requested the defendant to take it,

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and keep it up for his own benefit; that defendant did take and assume it as his own, with the knowledge of the insurance company, and from that time paid all premiums as they fell due; and that in consideration of so taking said insurance, he assumed the payment of the account of *Durand & Hill*, due from her, and that neither that account, nor the account of the defendant, was presented against the estate of *Mrs. Clark*; so that the only legal question to be here determined is, as to her right and power so to control and transfer the policy. The party procuring such a policy of insurance, may sell or dispose of it, or abandon it at pleasure. Angell on Fire and Life Ins., § 332, p. 411; *Godsal vs. Webb*, 2 Keen Ch. R., 99.

No formal assignment was necessary to pass the benefit of the policy. A mere deposit as security was sufficient. Angell on Fire and Life Ins. § 327, p. 405; Phillips on Ins., § 80, p. 60; 11 Mees. and Welby, 10; *Wells vs. Archer*, 10 Serg. & R., 412.

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By the Court, DIXON, C. J. This action was commenced, and if maintainable at all, can only be maintained upon the theory, that the plaintiff, as the *cestui que trust*, or party beneficially interested, acquired, during the lifetime of *Mrs. Clark*, an actual equitable interest in the policy, and the moneys thereby secured and agreed to be paid on her death. She effected the insurance on her own life. The policy sprang from an agreement, to which she and the insurance company were the real parties; and although the defendant, as the guardian of the plaintiff, was nominally the assured, yet during her life, and until she transferred it, she was the only person having any direct pecuniary interest in it. She received, and until the transfer and delivery to the defendant, held it in her possession, and with her own funds, or those procured by her from the defendant, paid the quarterly premiums, as they became due upon it. The true criterion by which to determine whether the plaintiff had any interest in the moneys received upon the policy, would seem to be, whether, during her life, he had such an interest in it as would have enabled him to compel *Mrs. Clark*, or the

defendant as nominal trustee, to keep up the premiums, upon the prompt payment of which its validity and value depended, or as would have enabled him to restrain or prevent her and the defendant from entering into and consummating the bargain which they did in relation to it. It is very evident that he was no party to the policy, or the agreement by which it was procured. The only parties, real and nominal, were the defendant, *Mrs. Clark* and the company. He furnished no part of the consideration upon which the policy was issued. If it was her intention, at the time she procured it, as it undoubtedly was, to have the money due upon it at her decease, paid over to him, or applied to his benefit, yet she was under no obligation, legal or equitable, to obtain it, or to keep it up after it was obtained. Neither she nor the defendant had made any contract or agreement with him, upon a valuable consideration or otherwise, to procure or to keep up such insurance. So far as he was concerned, it was a mere proposed gratuity or gift, a voluntary thing, which they were in no way bound to do, and which they might do or cease to do, as best suited their convenience or pleasure. He was a mere volunteer, not having any present beneficial interest, but who, it was intended at one time, should, on the happening of many contingencies, be so interested on some future occasion. He had no vested right in the policy or the moneys secured by it, and could have none until after the death of *Mrs. Clark*, he surviving her; and then only in the event of the contract, and the intention of the parties, remaining the same, and of her, or some other person in his behalf, having kept up the premiums. If it was a trust in his behalf, or by which it was intended that he should be benefited, it was executory and not executed; and it is well settled that courts will not interfere to enforce an executory trust at the instance of a volunteer. It seems quite clear, therefore, that during the lifetime of *Mrs. Clark* the plaintiff could neither have compelled the payment of the premiums, nor have prevented her from passing the policy over absolutely to the defendant. Considering the policy, as it was in fact, an executory contract between the company and *Mrs. Clark*, and the defendant consenting to

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act as trustee, no reason can be perceived why it was not, like every other executory agreement, subject to such disposition, changes and modifications, as the several parties to it might see fit or consent to make, and why *Mrs. Clark*, having changed her mind in regard to bestowing upon the plaintiff the benefits expected from it, or feeling herself unable to meet the premiums, might not, with the assent of the company, transfer it to the defendant, to be held by him for his sole use and benefit, he agreeing to pay the premiums. This the jury has found she did do, and as evidence of the assent of the company, it not only appears that they, for a long period of time, received from him the premiums, but also, on her death, actually paid over to him the money thereby secured.

The record discloses no errors for which, in our opinion, the judgment of the circuit court ought to be reversed, and it is therefore affirmed, with costs.

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A verified answer in an action under the Code, is not evidence for the defendant, as was an answer under oath under the former practice in equity.

Though a deed be made to a party by a wrong baptismal or christian name, the grant is good and the title vests in the intended grantee. The uncertainty as to the person of the grantee, does not in such case appear upon the face of the deed, but is caused by extrinsic evidence, and is therefore susceptible of explanation or removal by parol proof.

The title of such grantee is not affected by a deed of conveyance of the land made by a stranger *in the name* by which such grantee was wrongly designated, although the party receiving such deed, while knowing that the stranger was executing such deed in a name not his own, was ignorant that there was a mistake of the christian name in the first mentioned deed, and ignorantly supposed that such stranger had authority from the true owner of the land to convey the same, and under that belief, paid him the full value thereof.

APPEAL from the Circuit Court for *Dane* County.

This was an action to recover a tract of land in *Dane* county. The complaint alleged that in the lifetime of *Arnold Staab* (of whom the infant plaintiff is sole heir,) said

Arnold delivered to said *Mansfeld* a certain sum of money for the purchase of said land; that *Mansfeld* purchased the land for said Arnold, but by mistake or with a fraudulent intent, took a deed conveying said premises to "*Louis Staak*," instead of to "*Arnold Staak*," which deed was dated September 8d, 1853; that there was no such person as *Louis Staak*; that shortly after the death of said Arnold, said *Mansfeld* undertook to convey the land to the defendant *Sigelkow*, by deed purporting to be signed and acknowledged by *Louis Staak*, but really signed, and if acknowledged at all, acknowledged by said *Mansfeld*, the said *Sigelkow* well knowing at the time that the land did not belong to said *Mansfeld*, but to the heirs of said Arnold Staak, and that said Louis Staak was a fictitious person; that *Sigelkow* has, since the date of said deed, occupied the premises. Prayer, that *Sigelkow* may be adjudged to deliver up to plaintiff the possession of the said land; that said pretended deed of conveyance to *Sigelkow* be declared void, &c.

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The defendant *Mansfeld* did not appear or answer the complaint.

The defendant *Sigelkow*, by his answer, denies any knowledge or information sufficient to form a belief, whether said *Arnold Staak*, ever delivered any money to said *Mansfeld*, for the purpose of purchasing any land whatever. He admits that he purchased the land described in the complaint from said *Mansfeld*, but avers that the title to the same was in one Louis Staak, and that *Mansfeld* represented to the defendant that he had full power to sell and convey the land, and the defendant, being ignorant of the manner in which land should be conveyed, or of the power necessary to authorize said *Mansfeld* to make a conveyance, took the deed executed by said *Mansfeld* in the name of Louis Staak, paying him therefor the sum of \$650, believing that said *Mansfeld* had the legal right to sell and convey said land. He denies that he had any information at the time of said conveyance, that said land did not belong to said *Mansfeld*, or that he had not full power to sell and convey, or that the same belonged to the heirs of Arnold Staak, but avers, on the contrary, that he had no knowledge or information be-

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fore this suit was brought, that said Arnold Staak, or his heirs, ever had, or claimed to have, any interest in the land, or in the money with which the same was purchased.

The complaint and answer were both verified.

Catharine Straasburger, formerly the wife of Arnold Staak, and who was a sister of *Mansfeld*, was the only witness in support of the complaint. The facts testified to by her, are stated sufficiently in the opinion of the court.

The circuit court decided, "that the testimony of Mrs. Straasburger alone, particularly in a chancery case as this was, would not be sufficient to support the complaint, so far as it was denied under oath by the answer of the defendant *Sigelkow*, and that, therefore, the complaint in this action must be dismissed;" to which decision and finding of the court the plaintiff excepted, and judgment being entered accordingly, the plaintiff appealed.

Smith & Salomon, for appellant:

1. The answer of a defendant, whether under oath or not, is not entitled to any weight whatever now as a matter of evidence.

2. *Sigelkow* cannot be regarded as a *bona fide* purchaser. He bought the land of *Mansfeld*, who was neither the real nor apparent owner of it. This is not a case of a resulting trust, but a case where, by mistake or fraud, the name of a grantee in a deed was incorrect. A mistake in the christian name may be shown by parol. *Fletcher vs. Mansur*, 5 Ind., 267; *Morse vs. Carpenter*, 19 Vt., 613; *Price vs. Page*, 4 Ves., 680; *Miller vs. Travers*, 21 E. C. L., 288; *Connolly vs. Pardon*, 1 Paige, 291; *Beaumont vs. Fell*, 2 P. Wms., 140; *Thomas vs. Stevens*, 4 Jac., 607; *Smith vs. Doe*, 6 E. C. L., 207, 244.

Spencer & Firmin, for respondent:

1. The proof fails to connect *Sigelkow* in any manner with the frauds charged upon *Mansfeld*, and fails to show that he had any notice of the claim of the plaintiff, or that the title was otherwise than it appeared to be on the face of the deed. The plaintiff has no right to have the deed reformed by inserting the name of Arnold Staak as grantee, instead of Louis Staak. A mistake that a court of equity

may correct, must be a mistake of both parties to the contract, and must be clearly proved. 2 Ames, R. I Rep., 130; 1 Story's Eq. Jur., §§ 152, 157; 5 Mason, 575, 577. A mistake in a written instrument will not be corrected to the prejudice of innocent parties who have no notice of the mistake. *U. S. vs. Munroe*, 5 Mason, 578; *Kesler vs. Zimmer-schulte*, 1 Texas, 50. A court of equity will not interfere in case of a mistake in written instruments as against *bona fide* purchasers for a valuable consideration without notice, because they have at least an equal claim to the protection of the court. 1 Story's Eq. Jur. § 165; *Whitman vs. Weston*, 30 Maine, 285. *Sigelkow* is a purchaser for a valuable consideration, without notice, and is entitled as such to protection.

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2. The credibility of the only witness for the plaintiff is affected by the fact, that if a recovery is had, she becomes entitled to dower in the land. She testifies that she was sick at the time Arnold Staack gave *Mansfeld* the money to buy the land, and *Mansfeld* is just now conveniently missing.

3. If Louis Staack is a fictitious person, then the legal title to the land in question is in the *grantors* in the deed, and the respondent, having a superior equity, has a right to call upon them for a conveyance that will invest him with a legal title. 2 Leading Cases in Equity, part 1, p. 70.

By the Court, DIXON, C. J. There is a vast difference between a verified answer according to the provisions of the Code of Procedure, and an answer under oath according to the practice which formerly prevailed in courts of equity, in respect to their effect as evidence in the action. The latter was evidence, but the former is not. Under the former system the bill could be so framed, with proper charges and interrogations, as to operate not only as a statement of the complainant's cause of action, but also as a complete and searching examination of the defendant as to all facts within his knowledge, or upon which he had any information or belief, which would tend to make out or sustain the same. The object was to search his conscience, and, in many instances, to lay the foundation for, and establish the com-

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plainant's claim for relief upon facts of which he alone was cognizant. The necessity for such a proceeding arose from the fact, that in no other way could his testimony be obtained. He was incompetent, and could not be called upon to give evidence in the manner in which disinterested persons were. Hence the complainant was allowed to so draw his bill as not only to concisely state his claim or demand, but likewise to embrace in it various collateral matters of fact, which, though not strictly pertinent as matters of pleading, were deemed necessary as evidence going to support such claim or demand, and to put questions to the defendant concerning them, to which he was bound, under oath, to respond. But the machinery of complaining and answering fixed by the code is quite different, and renders these things impossible.

The distinction between actions at law and actions in equity, and the forms of pleading in the same, is abolished, and the complaint in all cases must be "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

The answer too must not embrace matters which, though pertinent as evidence, would not be so as pleading, but "must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief," or "a statement of any new matter constituting a defense or counter claim, in ordinary and concise language, without repetition."

It is very evident from these provisions, that it was not the intention of the legislature that the complaint should be so framed as to draw from the the defendant a statement of any facts collateral to, though bearing upon, the main issue; nor that the answer should set forth any such facts. In abolishing the system of pleadings which formerly prevailed, the legislature at the same time removed the necessity for this species of examination, by providing, that in all cases the opposite party may be examined at the trial, or his testimony taken as in the case of any other witness, thereby furnishing a more direct and satisfactory mode of enabling each

party to obtain the evidence and probe the conscience of his adversary. The reason of the old chancery rule has, therefore, ceased to exist. The object of allowing the plaintiff, by a verification of his complaint, to compel the defendant to swear to the truth of the matter contained in his answer, undoubtedly was to simplify the issue by confining it to the real facts in controversy, and to rid the case of false and sham defenses, which might otherwise be put in, for the purpose of delaying the plaintiff in the speedy acquisition of his rights, and was not to enable the parties to use the answer as evidence, except so far as it contained admissions of the plaintiff's cause of action, in which respect it would have the same effect as any other admissions of a judicial character. We are therefore of opinion that the verified answer of a defendant in a civil action instituted under the code, is not evidence for him as such an answer was under the former practice in equity, and which could only be overcome by the testimony of two witnesses, or of one witness and clear corroborating circumstances, but that in this respect it is to be treated like any other pleading.

The evidence in the case conclusively shows that Arnold Staak, deceased, of whom the plaintiff is sole heir at law, furnished and delivered to the defendant *Mansfeld* (who, for the purpose of effecting a bargain for and procuring a conveyance to him of the land in question, undertook to act as and did in fact become his agent,) the entire purchase money, save a very small portion, which, soon after his death, (which happened shortly after the trade was perfected,) was paid over to him by the widow, with money realized from the estate; and that the money so furnished and delivered, was in fact applied by *Mansfeld* to the purposes intended. It likewise as conclusively appears that *Mansfeld*, either by mistake or intentionally, and which, it is unnecessary, for the purposes of this action, to inquire, took the conveyance in the name of *Louis Staak* instead of *Arnold Staak*. The deed thus executed and recorded in the county of Dane, was taken by *Mansfeld* from there to the city of Milwaukee, (where Staak lived, and at which place he soon after died,) and delivered to him. On receiving the

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deed Staak discovered the discrepancy in the name; he called *Mansfeld's* attention to it, and was told by him that it was accidental and occasioned by reason of his being ignorant of the true name. The deed, after having remained a short time in Staak's possession, was by him delivered to *Mansfeld*, to be taken by the latter to the county of Dane for the purpose, as the parties ignorantly supposed, of enabling him, in behalf of Staak, to execute a mortgage of the land to one of Staak's creditors to whom he owed \$100, which he was desirous of securing in this way. *Mansfeld* never afterward returned the deed, and never executed or attempted to execute the mortgage, as it was believed he might, but in February, 1854, and upwards of a year after Staak's death, sold the land to the defendant *Sigelkow*, receiving a valuable consideration therefor, and executed and delivered to him a conveyance signed and acknowledged by himself in the name of Louis Staak. There was not, to the knowledge of any of the parties, any such person in existence as Louis Staak. This *Sigelkow* knew, but he did not know that Arnold Staak paid the purchase money or was the person beneficially interested. He was well acquainted with *Mansfeld*, and knew his full name, and that it was not that by which he signed and acknowledged the deed, but in ignorance of the law, he was induced to believe that the title to the land could thus be passed.

It is obvious that the first question to be determined is, whether, by virtue of the deed executed to Louis Staak, the title of the land passed to Arnold Staak, the intended grantee. We are clearly of the opinion that it did. It is to be observed that the whole transaction shows that he was the person really intended. *Mansfeld* was his agent for the express purpose of buying the land; he furnished the purchase money; the deed, soon after its execution, came into his possession; his surname was correctly set forth in the deed, and so far he was properly described by it; and there was no such person in existence as Louis Staak, for whom it could have been intended. These circumstances seem to place the intent beyond a doubt, and the question arises whether the disagreement or mistake in the baptismal or christian name

can be explained by parol testimony, so as to give effect in law to the deed. We think it may; that it is a latent ambiguity which is susceptible of explanation by parol proof. It is certain that the deed upon its face gives rise to no doubt or uncertainty, which proves that the ambiguity is latent and not patent. But on looking around for the person of the grantee to whom to apply it, a difficulty arises; we find no such person in existence as Louis Staak; and to explain or remove the difficulty or uncertainty thus brought in by the introduction of extrinsic evidence, further proof as to the person really intended, may be received. Such evidence, when admitted, does not tend to impeach or contradict the deed, but to support and uphold it by removing the doubts arising from external circumstances, and applying the grant to the person for whose benefit it was intended. Chief Justice TINDAL, in applying the maxim, "*ambiguitas verborum latens, verificatione suppletur*," to the case of a will, in *Miller vs. Travers*, 8 Bing., 244, (21 E. C. L., 288,) states the general doctrine of the law as applicable to all written instruments with great force and clearness. He says: "But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other. * * * The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found that there are more than one estate or subject matter of devise, or more than one person, whose description follows out and fills the words of the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max., 23; Hob. Rep., 32; *Edward Alham's case*, 8 Rep., 155.) The other class of cases is that in which the description contained in the will, of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called A,

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and is described as in the occupation of B, and it is found that though there is an estate called A, yet the whole is not in the occupation of B; or where an estate is devised to a person whose surname or christian name is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who is the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence." Certainly enough appears on the face of the deed in this case to authorize the application of the rule here laid down. The surname of the grantee is correctly stated, and the circumstances in evidence by the parol proof put the intention beyond doubt. The question here involved was directly raised and decided in the case of *Connolly vs. Pardon*, 1 Paige, 291, in which it was held that where a testator made a bequest to a person by a wrong christian name, parol evidence was admissible to show what person was intended. See also *Fletcher vs. Mansur*, 5 Ind., 267; *Morse vs. Carpenter*, 19 Vt., 613; *Price vs. Page*, 4 Ves., 680; *Beaumont vs. Fell*, 2 P. Wms., 607; *Thomas vs. Stevens*, 4 Jac., 607; *Smith vs. Doe*, 6 E. C. L., 244; and 3 Cowen & Hill's notes, No. 988, pp. 1858-78.

To the same effect is the author of the Touchstone. He says, (p. 286): "Regularly it is requisite that the grantee be named by his names of baptism and surname, and so it (i. e. this mode) is most safe; and special heed must be taken to the name of baptism, for that a man cannot have two or more names of baptism as he may of surnames (Godh., 17; 8 Newn., 38); and yet in some cases, though the name be mistaken, the grant is good (Bro. Nosme., 9); as if a grant be to I. S. and Em his wife, and her name is Emelin (Bro. Conformation, 30); or a grant is made to Alfred Fitzjames by the name of Ethelred Fitzjames (Co. 6; 65; 27 E., 8, 85); or a grant be to Robert, Earl of Pembroke, where his name is Henry; or to George, Bishop of Norwich, when his name is John (Co. super Lit., 8); or a grant be to a mayor and commonalty, or a dean and chapter, and the mayor or dean is not named by his proper name (Dyer, 119); or a grant be to

L. S., wife of W. S., (Hob. 32), where she is sole (3 Taunt, 342); all these and such like grants are good; for in this case the rule doth hold, *utile per inutile non vitiatur*; and *nil facit error nominis cum de persona constat*. Co. super Lit., 3." June Term,
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The title of this land therefore vested, on the execution and delivery of the deed to *Mansfeld*, in Arnold Staak, the ancestor of the plaintiff, and upon his death passed by operation of law to her. Consequently she was seized at the time *Mansfeld* attempted to convey to the defendant *Sigelkow*. This seems to be the end of the case; for it is hardly necessary for us to add that *Mansfeld* could not transfer the title to *Sigelkow* at the time of the execution and delivery to him of the pretended conveyance; and in this view it can make no difference whether *Sigelkow* acted in ignorance of the law, or in good or bad faith, for in neither event could he have received anything by the deed.

The judgment of the circuit court must therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion.

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The concurrent execution and delivery of two chattel mortgages upon the same property, to different parties, makes the mortgagees tenants in common of the property mortgaged, and they should join in an action for the unlawful taking or the conversion of it.

A mortgagee of personal property may maintain replevin against a person taking the same in defiance of his right, although he was not in actual possession of the property, if, by the terms of the mortgage, he was entitled to take possession whenever he deemed that the safety of the debt required it.

Where a debtor made several chattel mortgages to certain of his creditors, in their absence and without their knowledge, and handed the same to his own attorney with a declaration that he delivered them to him for the use of the mortgagees, and the attorney, at his request, filed the mortgages in the office where by law such mortgages were required to be filed, and wrote to the mortgagees, notifying them of the execution of such mortgages, but attachments were levied upon the same goods, by other creditors of the mortgagor, before the mortgagees had received notice of, and had assented to, or accepted said mortgages: *Held*, that the attachments were entitled to preference.

12	594
76	536
12	243
79	452
12	243
90	330

12	343
54	111 888n
54	111 906n
54	111 906n

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ERROR to the Circuit Court for *Dane County*.

The plaintiffs below, who composed two firms, doing business under the names respectively of *Sackett, Belcher & Co.* and *Widdefield, Cohn & Co.*, sued the defendant *Welch* for trespass in taking and carrying away from a building occupied as a store by one *Harding*, certain goods, alleged to belong to the plaintiffs.

The answer was, 1st. A general denial. 2d. As to a part of the goods, particularly described, that the defendant took the same, as the agent of *J. Dahlman & Co.*, by virtue of a mortgage executed to them by said *Harding*, and filed on the 18th of December, 1858, in the office of the clerk of the city of *Madison*, where said *Harding* resided; and as to the residue of said goods, that the defendant seized the same on the 23d of December, 1858, by virtue of sundry writs of attachment against the property of said *Harding*, duly issued out of the circuit court of *Dane county* on that day, and delivered to the defendant as sheriff of said county, to be executed; that said goods were, at the time of said seizure, the property of said *Harding*; that the plaintiffs claim to be the owners of said goods by virtue of two mortgages, bearing date December 20th, 1858, purporting to be executed by said *Harding*, one in favor of *Sackett, Belcher & Co.*, and the other in favor of said *Widdefield, Cohn & Co.*; but that said mortgages were made by said *Harding*, and filed, without the request, assent or knowledge of the plaintiffs; and that at the time of said seizure, said mortgages had not been delivered to the plaintiffs, or either of them, nor to any agent or attorney authorized by them to receive the same, nor had they any knowledge that the same had been executed, or ever assented to or ratified the same. The defendant further alleged in his answer, the rendition of judgment against said *Harding*, on the 26th of January, 1859, in each of the actions in which said warrants of attachment were issued, the issuing of executions upon such judgments, the sale of the property attached, and the application of the proceeds, first to the satisfaction of the mortgage to *Dahlman & Co.*, and the residue, *pro rata*, upon said executions.

The principal question in controversy between the parties

was, whether there had been a delivery of the mortgages to the plaintiffs prior to the levy of the attachments.

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Upon the trial of the cause, the plaintiffs gave in evidence three notes executed by said Harding, one dated August 11, 1858, payable to *Widdefield, Cohn & Co.*, for \$278,62, at six months after date, and two dated August 9, 1858, payable to *Sackett, Belcher & Co.*, one for \$815,48, at four months after date, and the other for \$659,10, at six months after date; and also two mortgages upon all the goods, &c., described in the complaint, made by said Harding, one to *Widdefield Cohn & Co.*, and the other to *Sackett, Belcher & Co.*, for the security of the notes held by them respectively, each of which mortgages bore date December 20th, 1858, and contained a clause authorizing the mortgagees to take possession of the goods whenever they should deem that their interest, or the safety of the debt required it.

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The defendant objected to the introduction of the notes and mortgages in evidence, upon the ground that they showed that the plaintiffs had not a joint interest in the goods described in the complaint, but the court overruled the objection, and the defendant excepted. The defendant admitted, for the purposes of the trial, that on the 23d day of December, 1858, he took and carried away the goods described in the complaint. The proof as to the execution of the mortgages under which the plaintiffs claimed title, was substantially as follows:

Harding, the mortgagor, testified that the mortgages were executed by him in Madison, on the 20th of December, 1858; that the plaintiffs resided in the city of New York, and were not present at the time of making the mortgages; that the witness employed Mr. Haskell, an attorney, to draw them up, and paid him for them; that the plaintiffs did not know of the making of the mortgages until a letter could reach them; that he told the firm of Collins, Atwood & Haskell, to write to all the parties to whom the mortgages were given; that at the time the defendant took the goods under the attachments, on the 23d of December, the witness had not heard from the plaintiffs; that a letter cannot go to New York and back in three days; that the debts for which the

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mortgages were given were all honest and *bona fide*; that at the time of the execution of the mortgages to the plaintiffs, he executed another upon the same goods to Swift & Co., who afterwards gave up the mortgage and had an attachment levied on the goods, and another mortgage to Phelps, Bliss & Co., which has been paid; all the mortgages amounting to \$6,000 and upwards, and the mortgaged property being worth between \$2,100 and \$2,200, at retail prices, at Madison.

Mr. Haskell testified in substance as follows: "I drew the chattel mortgages from Mr. Harding to the plaintiffs, on the 20th day of December, 1858; they were made in our office; after they were signed, I attached the schedules, and then handed the mortgages to Mr. Harding, and said to him, 'Here, Mr. Harding, are your mortgages; they are now at your disposal.' Mr. Harding then said, 'I suppose they must be delivered, must they not? I deliver the mortgages to you for the mortgagees.' And then he delivered them to me. He also requested me to notify the New York creditors that he had executed these mortgages to them, and to see that they were filed. I handed the mortgages to George E. Woodward, and requested him to carry them to the city clerk's office and see that they were filed. The mortgages read in evidence are the same mortgages. We wrote to the mortgagees on the 22d of December, 1858, informing them of the making of these mortgages, and on that day I deposited in the post office at Madison, the letters postpaid, directed to the creditors in New York. I gave the mortgages to Woodward to file, because it was time for me to go to dinner, and I thought it would make no difference who carried them to the clerk's office. Woodward is the son-in-law of Harding. I acted as the attorney of Harding in drawing these mortgages. In reply to his question asking if they must not be delivered, I told him it would be a sufficient delivery of the mortgages if he put them on file in the city clerk's office, and told the clerk what they were for, and wrote to the mortgagees, or that if he chose, he might deliver them to me, and that I would see them filed and notify the mortgagees. When he delivered the mortgages

to me, he said, 'I deliver them to you for the mortgagees,' or possibly, instead of the word 'mortgagees,' he used the word 'creditors,' or 'them,' but some word meaning the same thing. I saw the letter that my partner, Mr. Atwood, wrote to Swift & Co. The ones that I wrote were substantially the same. He wrote two of the letters, and I wrote two. I did not advise Mr. Harding that in order to render the mortgages valid to the creditors, they must first do some act to accept them. I advised Harding to make a delivery of the mortgages, because I understood that a delivery was essential to their validity, but I did not advise him to appoint me the agent of the mortgagees. Up to the time of the delivery, I was acting for Harding, and the New York creditors had not employed me to act for them."

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George E. Woodward testified, that at the time the mortgages were executed, Mr. Haskell, in the presence of Mr. Harding, requested witness to file the mortgages, and he took them to the city clerk's office, a little after noon of that day, and filed them.

Mr. Harding, being recalled by the plaintiffs, further testified as follows: "I delivered the chattel mortgages which have been introduced in evidence, to Mr. Haskell, for the use of the mortgagees. I asked Haskell if it was not requisite to deliver them, and he said I might deliver them to the city clerk, or to him for them. Then I handed the mortgages to Haskell, and said, 'I deliver these to you for the mortgagees.' I never have had or controlled the mortgages since that time, and have never seen them since until I saw them here."

The defendant read in evidence a letter from Messrs. Collins, Atwood & Haskell to Swift & Co., of New York, dated December 22d, 1858, in which, after informing them that Mr. Harding had, on the 20th instant, executed four chattel mortgages of even date, on his stock, to the four New York firms hereinbefore mentioned, they say: "Mr. Harding is confident you will ratify the proceeding, and he is now professing to act as your and their agent, and keeping the funds arising from sales apart, for the purpose of applying them *pro rata* in payment of the claims of the above named houses. An acceptance of the security given would not, of course,

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bar your right to assert your whole claim. We would therefore suggest that some action be taken by you to avail yourselves of the mortgage security. We have written a like letter to each of the above firms." The defendant also proved the execution of the chattel mortgage to Dahlman & Co., referred to in the answer, and also the several warrants of attachment, judgments and executions mentioned in the answer, and that he levied upon and sold the goods, &c., by virtue of said writs, as in the answer alleged.

After the testimony was closed, the defendant's counsel requested the court to give the jury the following instruction: "If the jury believe from the evidence, that Harding made the mortgages read in evidence by the plaintiffs, in the absence and without the knowledge or consent of the plaintiffs at the time of the execution thereof, and that they were not delivered to some of them, or some person authorized by the plaintiffs to act for them, then the plaintiffs cannot recover in this action, unless they have also proven that they did some act approving and ratifying the delivery of the mortgages to Mr. Haskell, before the defendant made the levies under and by the attachments in his hands;" which instruction the court refused to give in terms, but did qualify the same as follows: "but if you find that the mortgages were delivered to a third person for the sole use and benefit of the mortgagees, then the assent of the mortgagees will be presumed or implied, if you find that the mortgages were beneficial to them, and it is a sufficient delivery."

The defendant also asked the court to instruct the jury as follows: "The placing of the mortgages read in evidence by the plaintiffs, in the office of the city clerk, by the said Harding, or his agent or attorney, without the knowledge of the plaintiffs, and without any direction or intimation to said clerk, by Harding, or his agent or attorney so placing them on file, that the mortgages were placed on file to remain there under his charge for the use and benefit of the mortgagees, is not such a delivery and filing of said mortgages as will entitle the plaintiffs to hold the goods mentioned therein, against creditors attaching before the plaintiffs had knowl-

edge of the making of said mortgages or had ratified the acts of Harding or his said agents;" which instruction the court refused to give in terms, but qualified the same by adding thereto as follows: "unless you find that the mortgagor, Harding, caused the mortgages to be so filed, with the intention of a full delivery of the mortgages in this way, and for the sole benefit of the mortgagees."

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The defendant's counsel also asked the following instructions: "If the jury believe that Harding was entitled to the possession of the goods mentioned in said mortgages, at the time the defendant made the levy upon them by virtue of an attachment against the goods of Harding, then the plaintiffs cannot recover;" and, "Although the jury should believe that the mortgages were valid between Harding and the plaintiffs, yet if Harding was entitled to the possession of the goods at the time of the levy by the defendant, then the defendant was authorized by the attachment in his hands, to take possession of the goods and hold and sell the interest of Harding therein, and this defendant is not liable to the plaintiffs in this action;" which instructions the court refused to give in terms, but did qualify the same as follows: "unless you find that the plaintiffs, at the time of the commencement of this suit, were entitled to the possession of this property, or were the owners thereof. In this state the mortgagee of chattels is entitled to the possession at any time after the execution of a mortgage, unless it is stipulated that the property shall remain in the possession of the mortgagor."

To the refusal of the court to give the said instructions in the terms asked for, and to the said qualifications attached thereto, the defendant excepted.

The defendant also asked the court to instruct the jury, that if the plaintiffs, on the 28d day of December, 1858, and before the levy of the attachment by the defendant, were not in possession of the goods mentioned in the mortgages, they could not recover in this case; which instruction was refused, and the refusal excepted to. The court, in its general charge, instructed the jury as follows: "The question whether the mortgages were delivered to the mortgagees before the levy of the attachments, is one of some difficulty. If they were

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not delivered before the levy, they are of no avail in this suit. They do not become effectual for any purpose until delivered. Upon this question I charge you, that if you find that Harding, the mortgagor, executed the mortgages and delivered them to Mr. Haskell, with the direction to place them on file in the city clerk's office for the use and benefit of the mortgagees, and that such was the declared intention of the mortgagor, and that they were so filed in the city clerk's office before the levying of the attachments, it was a good and valid delivery of the mortgages, even though the mortgagees themselves had no knowledge thereof, and had given no direction concerning such mortgages, until after the attachments in this case were levied upon the property. If you find that the mortgages were made in good faith, and were so delivered and filed in the city clerk's office before the levy of the attachments, the plaintiffs are entitled to recover;" to the giving of which instruction the defendant also excepted. The jury found a verdict in favor of the plaintiffs for \$1,860, and judgment was rendered thereon.

Smith, Keyes & Gay, for plaintiff in error.

1. The plaintiffs claim by two distinct chattel mortgages, one to each firm, securing different sums; they consequently have not a joint interest (if any) in the goods, and the damage done to them is to different and separate amounts, and not one entire joint damage; they could not therefore join as plaintiffs, and the notes and mortgages were improperly admitted under the pleadings. 1 Chitty on Plead., p. 64; *Chambers vs. Hunt*, 3 Harr., 339.

2. The plaintiffs' mortgages, if held good, were not due when the defendant levied the attachments; they had neither the actual nor the constructive possession of the goods, and cannot maintain trespass for the taking of the property from Harding, the mortgagor, upon the attachments against him. *Hull vs. Carnley*, 1 Kern., 501; *same case*, 17 N. Y., 202.

3. The mortgages were executed without the knowledge of the mortgagees, and received and filed by Mr. Haskell, who never had any communication or correspondence with the plaintiffs, or authority from them to act in their behalf, but was acting solely as the attorney for Mr. Harding; and

the plaintiffs knew nothing whatever of the transaction until after the defendant below had levied the attachments on the goods. The mortgages are, therefore, void as against the attaching creditors. *Dale vs. Bodman*, 3 Met., 139, 143; *Hague vs. Rolleston*, 4 Burr., 2174; *McCourt vs. Myers*, 8 Wis., 236; *Church vs. Gilman*, 15 Wend., 656, 660; 2 Hilliard on Mort., 278; 2 Hilliard on Real Property, 267, § 16; Fearn on Contingent Remainders, 360-364 inclusive; *Sampson vs. Thornton*, 3 Met., 275; *Goodsell vs. Stinson*, 7 Black., 437; *Ferguson vs. Miles*, 3 Gilman, 358; *Hulick vs. Scovil*, 4 id., 159.

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A deed may be delivered to a third person for the benefit of a grantee, and if he afterwards assent to the act, the deed will take effect from the date of delivery, unless the rights of third persons shall be affected by it. In that event the doctrine of relation would not apply, for it is a rule that it shall not be permitted to apply so as to do wrong to strangers. 7 Blackf., 439; *Case vs. DeGoes*, 3 Caines' Rep., 261; 4 Johns., 230; 12 Pick., 141; 5 S. & R., 523; *Jackson vs. Bodle*, 20 Johns., 184; 13 Conn., 83.

The weight of authority is against the doctrine that a deed is delivered when it is recorded. 7 Blackf., 440; *Jackson vs. Phipps*, 12 Johns., 418. The ratification of an unauthorized act cannot affect intervening rights. *Sturtevant vs. Robinson*, 18 Pick., 180; *Beals vs. Allen*, 18 Johns., 363. The presumption that a person will accept a deed because it is beneficial to him, has never been carried so far as to consider him as having accepted it. *Hulick vs. Scovil*, 4 Gilman, 159. Where a deed was sealed and acknowledged and left for record in the clerk's office, but neither the grantee nor any person in his behalf was present to receive it, it was held inoperative. *Jackson vs. Dunlap*, 1 Johns. Cases, 114; *Verplank vs. Serry*, 12 Johns., 550. To constitute the delivery of a deed or chattel mortgage, the grantor must part not only with the possession but with the control of it, and deprive himself of the right to recall it. *Com. Bank vs. Reckless*, 1 Halst. Ch. Rep., 430; *McCourt vs. Myers*, *supra*. The mortgages in this case were left at the city clerk's office, without any instructions or directions whatever, and could have been

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withdrawn at any time by Woodward, Harding or Haskell
Collins, Atwood & Haskell, for defendants in error.

Chattel mortgages like those in this case, give to the mortgagees the right of immediate possession of the goods, and vest in them title sufficient for them to maintain trespass against any third person who wrongfully takes away the goods. *Ferguson vs. Thomas*, 26 Maine, 499; *Stewart vs. Hanson*, 35 Maine, 506; *Case vs. Winship*, 4 Blackf., 425; *Woodruff vs. Halsey*, 8 Pick., 383; *Pettis vs. Kellogg*, 7 Cushing, 456; *Rich vs. Milk*, 20 Barb., 616; *Cotton vs. Marsh*, 3 Wis., 221.

The facts testified to in this case constituted a valid delivery of the mortgages, and they became as effectual at the instant of such delivery (there being no proof of refusal or dissent on the part of the mortgagees to accept the security) as if they had been at the same time delivered to the mortgagees in person. It was wholly immaterial that the mortgages were made in the absence, and without the knowledge or any previous agreement or request of the mortgagees; and that there was no subsequent express acceptance of or assent to them by the mortgagees, before the levy of the attachments, three days afterwards, as assent will be presumed until dissent is shown. *Sheppard's Touchstone*, 57, 58, 72; *Butler vs. Baker*, 2 Coke, 68-72, cited in 1 Salkeld, 301; *Thompson vs. Leach*, 2 Ventris, 198; *Buffum vs. Green*, 5 N. H., 71; *Hodges vs. Hodges*, 9 Mass., 307; *Wilt vs. Franklin*, 1 Binney, 502; *Read vs. Robinson*, 6 Watts & Sergt., 329; *Skipwith's Ex. vs. Cunningham*, 8 Leigh, 271; *Doe vs. Knight*, 5 B. & C., 671, (12 E. C. L. R., 351); *Halsey vs. Whitney*, 4 Mason, 206; *Tompkins vs. Wheeler*, 16 Peters, 106; *Church vs. Gilman*, 15 Wend., 656; *Merrills vs. Swift*, 18 Conn., 257; *Cooper vs. Jackson*, 4 Wis., 537; *McCourt vs. Myers*, 8 Wis., 236; *Buffington vs. Curtis*, 15 Mass., 529.

Nor was there a misjoinder of parties plaintiff in the action in the circuit court. The mortgages both including the same goods, and both executed and becoming operative at the same instant of time, one to Messrs. *Sackett, Belcher & Co.*, and the other to Messrs. *Widdefield, Cohn & Co.*, gave to them a common interest in the whole and every part of the

goods, and entitled them to a joint possession. Under such ownership these firms, as well at common law as under the statute, might or must have joined as plaintiffs in an action against a trespasser upon the goods. Coke's Litt., (782-3) 609; *Hart vs. Fitzgerald*, 2 Mass., 509; *Hill vs. Gibbs*, 5 Hill, 56; *Rich vs. Penfield*, 1 Wend., 380; Rev. Stat., Ch. 122, § 20; 1 Chitty's Pleadings, 64, 65, 66; *Bloxam vs. Hubbard*, 5 East, 407; *Addison vs. Overend*, 6 Durnford & East, 357; *Sedgworth vs. Overend*, 7 id., 150; *Pickering vs. Pickering*, 11 N. H., 141; *Daniels vs. Daniels*, 7 Mass., 135.

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By the Court, DIXON, C. J. The first question involved in this case, I think, was correctly decided. It seems to me clear that the concurrent execution and delivery of the two chattel mortgages made the mortgagees tenants in common of the property conveyed. The legal effect was the same as it would have been if the goods had been mortgaged to them by one instrument, to be held by them as a security for their respective claims, and the proceeds, in case of a sale, to be divided between them in proportion to the amounts thereof severally. If an absolute sale of a chattel were to be made at one and the same time to two different persons, by instruments in writing, purporting to convey the whole of it, executed and delivered to each at the same moment, each having a knowledge of the sale to the other, (a transaction perhaps not likely to happen, but nevertheless not impossible), I imagine that we should find little difficulty in saying that the vendees thereby became tenants in common, each holding an undivided moiety of the article purchased. Neither having any superior right or equity, but both standing on an equality in those respects, the property would be divided. The same would be true of conveyances of real estate under the same circumstances. It can make no difference that the sales or conveyances are conditional. Their effect in this respect is the very same, except so far as the interests of the several vendees or mortgagees are limited and determined by the amount of the demands due to each. The defendants in error (plaintiffs below) were, therefore, not only enabled, but it was incumbent upon them, provided the

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SACKETT et al. The second question has been determined adversely to the plaintiff in the case of *Frisbee vs. Langworthy*, decided at the present term, 11 Wis., 375. We there held that a mortgagee of personal property, not in actual possession, might maintain replevin against a person taking the same in defiance of his right, where, by the terms of the mortgage, he was entitled to take possession whenever he deemed that his interest or the safety and security of the debt required. Such was the case of the present mortgagees.

The question which was considered by far the most important, and upon which the counsel bestowed the most attention, citing nearly all the English and American authorities, calls for the determination, in a case where a mortgage of personal property from a debtor to a creditor, is executed in the absence and without the knowledge of the latter, and delivered to a stranger for his use, of the time at which the title to the property mortgaged vests in the mortgagee, as between him and another creditor of the mortgagor who acquired an interest in it by attachment between the time of the delivery to the stranger and the time when the mortgagee actually received notice of and accepted it. Whilst it must be admitted that there is some conflict in the adjudications upon this subject, still both natural reason and the weight of authority tend to the same conclusion, which is, that the title in such case only vests from the time there is an acceptance in fact on the part of the mortgagee. On principle I think it may be laid down as an indubitable proposition in such case, that the title does not vest in fact, until the mortgagee has actually assented to the conveyance; and consequently, that until such assent it remains in the mortgagor. While all the courts acknowledge the correctness of principles which lead unerringly to this result, and clearly and positively exclude any other, it is somewhat strange that any should have been found to adopt a conclusion directly opposed to it. All agree that it is necessary to the validity of every deed or conveyance, that there be a grantee who is not only willing, but who does in fact accept it. It is a con-

tract, a parting with property on the part of the grantor, and an acceptance of it by the grantee. Like every other contract, there must be a meeting of the minds of the contracting parties, the one to sell and convey, and the other to purchase and receive, before the agreement is consummated. If there be anything in legal principles, or in common sense, it is an unpardonable absurdity to say, that a contract can be completed in the absence and utter ignorance of one of the contracting parties; that he can or does, under such circumstances, assent to, or agree to become bound by it. The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him without any motion or act of his signifying his willingness, but merely by his refusal to receive it at all, had its origin at a period in the history of the common law, when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by a mysterious and fanciful logic, that depended for its support upon artfully devised fictions and falsehoods, which for the most part were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done, is, I believe, attributable to the inventive skill of Justice VENTRIS, as exhibited in the case of *Thompson vs. Leach*, 2 Vent., 198, decided about the year 1690; at least several courts and judges since that time, with many complaints, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is, that a deed of lands made to a party, without his knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him, the instant the deed is parted with by the grantor, and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter. Inasmuch as this is the only attempt at sustaining it by argument to be found in the books, the

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more recent cases having, without discussion, gone off almost entirely on the strength of the *authorities*, I propose to examine some of the positions assumed by him, upon which his argument mainly depends, and from which, I think, its fallacy and the incorrectness of his conclusions will be clearly made to appear. He admits, what is universally conceded to be an indispensable element of every grant, namely, that it should be accepted by the grantee, and says, "that an assent is not only a circumstance, but it is essential to all conveyances; for they are contracts, *actus contra actum*, which necessarily suppose the assent of all parties;" but avoids the difficulty into which the admission of this well settled principle brings him, by saying, "that because there is a strong intendment of law, that for a man to take an estate is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage," therefore the law will presume that the grantee has accepted a conveyance before a knowledge of its execution and delivery has come to him. Upon the foundation of this hypothesis, misnamed by him a *presumption of law*, the falsity and unreasonableness of which are so self-evident that reasoning can hardly make them plainer, he proceeds to the erection of his superstructure. Assent or acceptance on the part of the grantee or other party to a deed or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a *fact*, the truth of which is to be established by competent evidence, before such deed or other instrument can be adjudged to have a legal existence. Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. But I deny that the existence of one fact is to be inferred or presumed from the existence of others, when the connection between the former and the latter is such that according to the course of nature it plainly appears that the former cannot exist. In other words, I deny that the existence of any fact may be shown by proving others which conclusively show its non-existence, or that the legitimate mode of establishing the truth of a matter is by indubitably proving its

falsehood. Justice does not require, nor does the law tolerate such an absurdity. The learned justice says, that where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, without the previous advice, direction or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it, the moment it is delivered to the stranger. *Assent* is an act of the mind—that intelligent power in man by which he conceives, reasons and judges, and of which it is a primary, invariable and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or *knows* their existence. Hence, without such impression or knowledge, there can be no assent, no *actus contra actum*; and to presume it in opposition to the facts, is to presume that which is impossible; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do.

"A presumption," says Mr. Starkie, "may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that as soon as the existence of the one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject." Presumptions thus defined, he says, are either *legal and artificial* or natural, and may be divided into three classes. 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2d. *Legal* presumptions made by a jury, or presumptions of *law and fact*. 3d. Mere natural presumptions, or presumptions of *mere fact*. The definition which he so clearly and accurately gives, although applied by him to all presumptions, is perhaps more strictly applicable to the latter class. The assent to a deed or other instrument by the grantee or other party, being a matter of *mere fact*, it is obvious that to the latter class also would belong a presumption in relation to such assent, in a case where such presumption could properly be indulged. But, whether

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the presumption be assigned to the one or the other of these classes, the position of the learned justice is equally untenable; for in no instance, not even the most artificial and arbitrary, does the law indulge in presumptions which are directly contradicted by the facts on which they are predicated. The known facts, though often insufficient of their own natural force and efficacy, to generate in the mind a conviction or belief of those which are inferred, are always, to say the least, not inconsistent with or opposed to them. If for example we take the case instanced by Mr. Starkie, of the presumption of the satisfaction of a bond after the lapse of twenty years, without payment of interest or other acknowledgment of its existence, while if a single day less than the twenty years has elapsed, such presumption does not arise, we find it to be extremely arbitrary and technical. No natural reason can be given why the lapse of the last day should operate to produce in our minds a conviction or belief of payment, while the lapse of all the days and years preceding it does not so operate. Such is not its effect. But as from common experience of the affairs of men, there arises in the mind, after the lapse of many years without payment of interest or other acknowledgment, a strong probability that a debt has been satisfied, and as the law loves certainty and industriously avoids doubts, it has from these motives *arbitrarily* fixed a period of time at the expiration of which this probability shall ripen into and take effect as a presumption of law, and at which the rights and position of the parties in reference to such debt, flowing from the *mere lapse of time*, unaccompanied by other circumstances, shall become determinate and certain. This presumption, which is in so many respects *artificial*, is in no respect inconsistent with the fact from which it is said to arise. On the contrary, though not conclusively sustained, it is strongly corroborated by the fact; since experience teaches that it is very improbable that the holder of the bond would, unless it were satisfied, permit such a space of time to elapse without receiving the interest or obtaining from the maker some other evidence of its non-payment. The same is true of that most purely artificial presumption, that a bond or other

specialty was executed upon a good consideration, which is so peremptory and absolute in its nature that it cannot be rebutted by evidence; whilst the consideration of another instrument, executed and delivered under precisely the same circumstances, and in the same words, but not under seal, may be freely inquired into and impeached; yet there the conclusion that it was made upon a good consideration is entirely consistent with the facts from which it is drawn; for there is much reason for supposing that without a good consideration, it would not have been sealed and delivered. Without multiplying illustrations, I think it will be found that in no instance (unless the present case is to form an exception) does the law infer the existence of facts in clear and direct opposition to those upon which the inference rests. It does not do so here. Reason rebels against it, and neither justice nor equity demands it. The only result of dropping the absurdity will be that, as in the present case, in a contest between two equally meritorious parties, the title to the property of which a conveyance was sought to be made, will be adjudged to be in him whom reason designates as the true owner.

The mistake of the learned justice consisted in his carrying the presumption of law so far as to say that it presumes that a person has consented to that of which he knows nothing, which is an impossibility; instead of saying, what was more truly said by the more logical and cautious courts and judges of his time, and by Lord ELLENBOROUGH, in *Stirling vs. Vaughan*, 11 East, 628, namely, that, if nothing appears to the contrary, the law presumes that he will accept that which is for his benefit, when he is informed of it, which assent, in the absence of intervening rights or equities, will have relation back to the time of delivery for his use, and make his title good as from that date. After a brief argument of this sort, he proceeds to say, "that very odd consequences and inconveniences would follow, if surrenders should be ineffectual till an express consent of the surrenderee," and that most disastrous effects upon estates and conveyancing in England would ensue, unless her courts adopted and upheld his absurdity. It is said that one error surely

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gives rise to another and a greater. This saying was never more aptly and forcibly illustrated, than by the fantastic feats which the learned justice makes the common law, the sober common sense of ages, perform by way of getting the title back again into the grantor in case the grantee refuses to accept the conveyance. He says that after, by this kind of one-sided contract, it has got into him without his knowledge, it remains with him without his consent until he absolutely rejects and spurns the offer, and that then, by some magical power of the law, such rejection, without deed or other writing, becomes an instrument of conveyance, by which the legal title to land is conveyed from one who has it to one who has it not, against the express wishes of the latter and in despite of his own deed, the highest and most solemn act known to the law, by which he could rid himself of it. It is not surprising that the learned and logical Chief Justice GIBSON, in *Read vs. Robinson*, 6 Watts & Sergeant, 329, while commenting upon what he calls "the masterly argument of Justice VENTRIS, in *Thompson vs. Leach*," says, that "the difficulty is to comprehend how the remitter can take effect without displacing intermediate interests springing from the rejected deed;" and then, as if in despair of ever comprehending it, he dismisses the subject from his mind by saying, "but the authorities conclusively prove that it may." All agree that neither the grantor nor the stranger who consents to receive and hold the deed, can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in the grantee at once, it must, of course, vest according to the terms of the conveyance, and in the case of an absolute conveyance, he would have an absolute title. If, after delivery to the stranger, and before notice to the grantee, a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee, it follows, as of course, that the creditor would have this right, and that he would at once acquire a lien to the extent of his demand. Suppose, after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does

the refusal unbind and set the property free from the seizure of the creditors, and remit the title at once back to the grantor? Or does the intendment of Justice VENTRIS step in, in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might, at some future period accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor, by which means it would happen that although it was neither bought nor sold, the grantor would, without consideration, lose it, and the grantee enjoy the full benefit of it on the same terms? Knowing of no rational or satisfactory answers which can be given to these and various similar questions which will readily suggest themselves to the reader, I leave them to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken, or other act of transfer, be thus mysteriously passed and re-passed between parties by contract. I deny that it may be. It seems to me very plain, that it does not pass in fact until the grantee has actually consented to receive it; and, as of course, that it remains with the grantor, who is unable, without such consent, to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give it validity. The justice assumed the question in controversy by saying that the execution and delivery of the deed to the stranger passed the title out of the grantor, and then he was under the necessity of resorting to these further absurdities in order to account for it; for he says, "that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed," and not "under such uncertainty, as a stranger that demands right should not know where to fix his action." If he had considered that the operation of the deed was suspended, or that it did not take effect until the grantee had assented, he would have been saved the trouble of drawing so largely on his imagination to show where the title was, and how it was thereafter to be controlled. It is a matter of no small moment, and

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of just pride to the bench of England, that Justice VENTRIS, at the time he wrote this wonderful argument, *dissented*, and that the other members of the court of common pleas, viz: POLLEXFEN, chief justice, and POWELL and ROKEBY, associates, were of opinion in the case, "that there was no surrender till such time as the surrenderee had notice of the deed of surrender and agreed to it," and that it was so adjudged by that court; and that the case was afterwards taken by writ of error to the King's Bench, of which Lord HOLT was at the time chief justice, and the judgment of the common pleas "was there affirmed by the unanimous consent of the whole court." It was afterwards brought by error into the House of Lords, where, as it is said, upon the reasons contained in Justice VENTRIS' argument, the judgment pronounced in both superior courts was reversed. Thus we have on the one side the legal learning, and almost the unanimous opinion of the courts, and on the other the judgment of reversal of the House of Lords, the great majority of whom knew very little, and cared less, about the correct settlement of legal principles.

The argument is of a piece with that kind of reasoning once employed to prove that titles to estates were "in abeyance," "in *nubibus*," and "in *gremio legis*," the folly of which is so thoroughly exposed and exploded by the severe and searching logic of Mr. Fearn, in his admirable treatise on Remainders. See pages 360 to 364, inclusive. It was held, in case of a lease to one person for life, remainder to the right heirs of another still living, that no estate remained in the grantor; and because there was no heir, for the reason that no one can be heir during the life of his ancestor, but only after his death, and because the tenant took only a life estate, the remainder was said to be in abeyance, in the clouds, or in the bosom of the law. These opinions were founded upon the very same assumption as that of Justice VENTRIS, namely; that the remainder passed out of the donor at the time of livery, and consequently that no estate remained in him thereafter; and because the title must always be somewhere, the advocates of the doctrine sent it to the clouds; "though," says Mr. Fearn, "by some sort of

compromise between common sense and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object beside hard and hardly intelligible words, for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, entitles the grantor, or his heirs, to enter and reassume the estate."

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The questions are so closely allied, and the substrata of the two follies are so exactly alike, that Mr. Fearn's reasoning is fully in point. And it is certainly refreshing, after a perplexing and vain effort to understand that which never was and never will be intelligible, to take up an author, who, like Mr. Fearn, treats the subject upon the principles of common sense. He intimates a conviction, that instead of the title to estates being in the clouds, there is a much stronger probability of *caput inter nubilia condit*, of the head of the inventor of the fiction having been buried or hidden in them. He says: "I cannot but think it a more arduous undertaking, to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles as well of common law as of common sense, a suspension of the complete, absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence." The same is true of the delivery of a deed to a third person for the use of the grantee, without his knowledge or previous direction. It is far more compatible with common law and common sense, to say that its operation is suspended until the happening of the event indispensable in the law to its validity, namely, an acceptance by the grantee, than to make the law perform the wonderful exploits of vesting and recalling the title contrary to its best settled and soundest principles. I am of opinion therefore, that the defendants in error took no interest in the goods in question by virtue of their mortgages, until after the plaintiff in error

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had seized them upon process of attachment, and consequently, that they cannot maintain their action.

Much was said in this case, about the manner in which the mortgages were delivered. There can be no doubt that so far as the mortgagor was concerned, the delivery was good. They were placed by him in the hands of a stranger, to be by him delivered to the mortgagees, and thus passed beyond his reach and control, unless the mortgagees, within a reasonable time after notice, should refuse their assent. This made the delivery, as to the mortgagor, valid and binding, which is all I understand the author of the Touchstone to mean, when he says that a deed "may be delivered to any stranger for and in behalf and to the use of him to whom it is made." But a delivery by the donor to a third person, for the use of the donee, and an acceptance by the latter, are two very different things. By the former, the donor signifies his willingness to part with the property, whilst by the latter the donee makes known his assent to receiving it, and both must concur before the title is changed or affected. It was formerly, and may perhaps by some be still supposed, that there can be no delivery without at the same time an acceptance; that they are correlative, inseparable parts of the same transaction, and must both occur at the same instant of time; and hence, in part, the fiction of relation, by which in case of a delivery by the grantor to a stranger, the subsequent acceptance by the grantee was carried back in legal contemplation to the time when the grantor gave the deed to the stranger, in order to save the logic of the law and to preserve "the eternal fitness of things." It seems to me that every case in which it has been adjudged that there may be a delivery to a stranger, and that a subsequent ratification by the grantee will make the instrument effectual for the purposes intended, falsifies this notion and proves that in every such case there may be, what there is in fact, a delivery by the grantor at one time to a third party, and an acceptance by the grantee from such third party at a subsequent and different time. Such is the common sense of the transaction; and it is better and more rationally disposed of without than with the aid of the fiction. But if the fiction must

be employed, then the maxim, *in fictione legis semper subsistit equitas*, applies, and it will not be allowed to operate when it infringes or violates the rights of strangers. It is only resorted to in furtherance of justice and to prevent injury. In this case the plaintiff in error is a stranger to the mortgages. He represents the rights and interests of the creditors of the mortgagor, who in good faith sued out and levied their attachments upon the goods, thereby lawfully acquiring a lien upon them; and it cannot be said to be in furtherance of justice, to postpone their demands thus legally secured, to those of the mortgage creditors, which are in no sense more equitable or just. The struggle is between innocent persons, to prevent loss, and the fiction ought not to be resorted to for the purpose of helping one as against the other. The transaction must be left to stand upon its simple and naked truth.

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It is unnecessary for me particularly to refer to the cases cited by counsel. Those cited for the plaintiff in error, in their principles *substantially* sustain the views which I have taken. Many of those cited by the counsel for the defendants in error, are not directly applicable, whilst some of them clearly and positively uphold the opposite doctrine. Of this latter character, besides the English, are *Buffum vs. Green*, 5 N. H., 71; *Wilt vs. Franklin*, 1 Binney, 502; and *Merrills vs. Swift*, 18 Conn., 257. In the first it does not clearly appear whether notice of the execution of the deed or the service of the process of attachment took place first. Both happened on the same day, but the court seem to adopt the theory that the title vested before notice to the grantee, and therefore the time of the service of the writ being immaterial, is not particularly noted. The principle upon which the doctrine rests is not discussed at all. The same is true of the case in 18 Conn. In both it is taken for granted that such is the effect of a delivery to a stranger. In *Wilt vs. Franklin* there was a dissenting opinion of Justice BRACKENRIDGE, in which the fallacy of the reasoning of his two associates is so calmly and clearly brought out that it would be folly for me to do more than refer the reader to it. The case of *Doe ex dem. Garmons vs. Knight*, 5 B. & C., 671, (12 E. C. L., 351,) was determined

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upon the binding authority of previous adjudications. The question having hitherto remained undecided in this state, no such obstacle to its correct determination exists.

In the case of *Cooper vs. Jackson*, 4 Wis., 537, it was expressly ruled, that "it is essential to the legal operation of a deed, that the grantee named therein assents to receive it, and there can be no delivery without such acceptance, but such acceptance need not be in person; it is sufficient if authorized or approved by the grantee." In that case the title of the grantee was held to be good as against the judgment creditor of the grantor, upon the express ground that there was a previous understanding between the grantor and grantee that the deed should be executed by the grantor and delivered by him to the register of deeds, to be recorded. This the court says constituted the register the agent of the grantee for the purpose of receiving it. Upon this subject the following language is used: "The case at bar falls fully within the principle of *Hedge vs. Drew*," (12 Pick., 141, previously noticed and commented upon in the opinion). "Here the grantee saw the deed after it was drawn, and the parties came to the understanding that the deed should be executed and left with the register to be recorded. There was an absolute divesting by the grantor of his estate in the land, and the deed was delivered to the register, who, *pro hac vice*, may be considered the agent of the grantee to receive it. *It is readily distinguishable from the cases where the grantor executes the deed without the knowledge of the grantee.*" In the case of *McCurt vs. Myers*, 8 Wis., 236, there was no attempt by the mortgagor to deliver the chattel mortgage to the city clerk, or any third person, for the use and benefit of the mortgagees, and consequently no question upon the effect of such delivery arose. The only point adjudicated was, that the mere act of the mortgagor in causing the mortgage to be filed in the office of the clerk, was not such a delivery as would operate to give the mortgagees any title or interest in the goods specified in the mortgage.

The judgment of the circuit court is reversed, and a new trial awarded.

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The decision in *Harteau vs. Eastman*, 6 Wis., 410, adhered to without re-examination of its grounds, a motion for a rehearing in that case having been argued and overruled, and the question involved having arisen under an old statute no longer in force.

The provision of the statute in force in 1838, requiring the judge to sign the record at the end of each day's proceedings, was directory, and such record is admissible in evidence, and a judgment entered therein valid, though not so signed by the judge.

APPEAL from the Circuit Court for *Brown* County.

This suit was commenced on the 4th of June, 1856, to recover the possession of lot No. 28, in the north ward of the city of Green Bay. The declaration was in the ordinary form in use before the enactment of the code. Plea, the general issue. The cause was once before in this court, and is reported in 6 Wis., 410, and came on again for trial, at the October term, 1858, in the Brown circuit court, when, by stipulation between the parties, the following facts were admitted. First. That on the 30th day of May, 1838, the real estate described in the plaintiff's declaration was owned and possessed by Joseph Dickinson. Second. That the said Joseph Dickinson died on the 7th day of June, 1838, never having sold or conveyed the said real estate. Third. That the said Joseph Dickinson, at his decease, left a widow, Mrs. Emily Dickinson, and two children, Jane and Emily; that the said widow and children resided upon the property in question at the time of the said Joseph Dickinson's death, and continued to reside there for less than a year thereafter; that Jane died in the fall of 1838, and that Emily, one of said children, was married to Lieutenant Benjamin Forsyth, in the year 1852; that she, the said Emily Forsyth, died in July, 1854, without issue, and that the said Benjamin Forsyth, who was the husband of said Emily, is living and now resides at Chicago, in the state of Illinois. Fourth. That the defendant, *Louis Harteau*, at the time of the commencement of this action, was in possession of so much of said real estate as is described in the verdict of the jury on the

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former trial of this cause, and held the same by virtue of a lease dated September 1st, 1847, as the lessee of Daniel Whitney, whose title to the said premises is relied upon by the defendant, and disputed by the plaintiff.

The plaintiff, to maintain the issue on his part, beyond the matters in the foregoing stipulation contained, produced Jonathan Wheelock as a witness, who testified in substance as follows: "I am the father of Emily Dickinson, wife of Joseph Dickinson. After the death of Dickinson, she married William Root. Dickinson, at his death, left two children, Emily, aged between three and four years, and Jane, about one year old. I was administrator on Dickinson's estate; was appointed June 21st, 1838. At the time of my appointment I resided in Green Bay; I lived at Green Bay until the summer of 1847. Since that time I have lived at Lawrence, about five miles from Green Bay. I knew Barlow Shackelford; he was an attorney. No other attorney by that name practiced here to my knowledge. From 1838 to 1841, I was in the habit of seeing Shackelford frequently; I knew him personally. I have known Daniel Whitney about forty years; Whitney was here when I came here, in 1833, and has lived here ever since. I continued to act as administrator until 1851, or 1852, I think."

The plaintiff thereupon offered to prove by said witness that no *scire facias*, or any other process or proceedings in the case of *Comstock & Andrews vs. Joseph Dickinson*, was ever served upon him, which evidence was objected to by the defendant as immaterial, and the court sustained the objection, and plaintiff's counsel excepted.

The plaintiff then gave in evidence a deed of conveyance of the premises in controversy, from William Root and wife to the plaintiff, for the consideration of \$1,200, dated May 27th, 1856, and recorded on the same day. Here the plaintiff rested.

The defendant offered, in evidence, a book which was admitted by the counsel for the plaintiff to have been found in the office of the clerk of said circuit court, and purporting to be a record of judgments in the district court of the United States, for Brown County, in which was the following entry:

"Territory of Wisconsin, county of Brown, ss. Be it remembered, at the May term of the Dis. court of the U. St's for the County of Brown, sitting as a circuit of the U. St's, began and held at Depere, the seat of justice of said county, on Monday, the 28th day of May, A. D., 1838, before the Hon. W. C. FRASER, judge of said court. It is presented by B. Shackleford, attorney for D. A. Comstock and Robert W. Andrews:—David A. Comstock, and Robert W. Andrews vs. J. Dickinson—*In assumpsit, on note of hand*. '\$317,18: New York, August 6th, 1833. Six months after date, I promise to pay to the order of Mr. Townsend & Harris, three hundred and seven 18-100 dollars. JOS. DICKINSON.'

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Indorsement:—'Pay order of Comstock & Andrews, TOWNSEND & HARRIS. Pay order B. Shackleford, Esq., COMSTOCK & ANDREWS.' And afterwards at the said term to-wit: Wednesday, the 30th May, A. D. 1838, comes the said pl'fs by their attorney, B. Shackleford, and also comes the s'd def't in his proper person, J. Dickinson, in said court, and says, that he cannot deny but that the said pl'f, D. A. Comstock and R. Andrews, has sustained damages in the premises, to the am't of three hundred and ninety-three dollars and eighteen cents (\$393,18). Therefore, it is considered by this court, that the said pl'f D. A. C. and R. A. do recover of the said def't, J. D., the said damages in the premises as above confessed, am't to three hundred and ninety-three dollars and 18 cents; also, the cost and charges of this court, am't to three dollars and thirty-one cents and 1-4 cts., together with the damages, in all am't to the sum of \$396,49, 1-2. Three hundred and ninety-six dollars and forty-nine and a half cents:

18 $\frac{1}{4}$ cents for docket the case of D. A. C. & R. Andrews vs. J. Dickinson.

6 $\frac{1}{4}$ cents for filing 1 paper.

12 $\frac{1}{4}$ " " Def'ts app.

10 " " Ent. Judg.

37 $\frac{1}{4}$ " " Cost. tax.

12 $\frac{1}{4}$ " " Sig. record.

18 $\frac{1}{4}$ " " Motion.

37 $\frac{1}{4}$ " " ass. damages.

12 $\frac{1}{4}$ " " ent. on calender.

1,12 $\frac{1}{4}$ " " record.

12 $\frac{1}{4}$ cents for Pl'ff's app.

3,81 $\frac{1}{4}$

6 $\frac{1}{4}$ ff.

12 $\frac{1}{4}$ satisf.

25 entries.

18 $\frac{1}{4}$ rules.

3,98 $\frac{1}{4}$

62, execution issued 15 June, 1839."

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The defendant objected to the admission of this evidence, First. Because there was no proof that the same was a judgment record. Second. Because the order of judgment is not signed by any clerk or any judge. Third. Because there are no names of either party in the order of judgment and no judgment against any one; but the court overruled the objection, and admitted said evidence, and defendant's counsel excepted. The defendant then called John B. A. Masse as a witness, who testified that he was clerk of said circuit court, and had been since January 1857; that he had the papers in the case of *Comstock & Andrews vs. Dickinson*; that he found them among the files in his office; that he had the execution, note and order to issue execution. The counsel for the defendant offered to read said papers in evidence, to which the plaintiff objected, because—1st. The execution, by its face, purports to have been issued after the death of Joseph Dickinson, the defendant therein named. 2d. It was issued more than one year after the death of Dickinson. 3d. It does not bear teste of any term or of any day in term of any court. 4th. It is not in the form prescribed by law. 5th. It was issued without any judgment to support it. 6th. The amount of the judgment described in it is different from the amount of the "judgment" read in evidence. 7th. The execution is void upon its face. 8th. It is immaterial, because the return shows no levy or sale. 9th. It is not returnable at any term of any court. But the court overruled the objections, to which ruling the defendant's counsel excepted, and said execution, with the indorsement and return thereon, were read in evidence as follows:

[L. s.] Territory of Wisconsin, county of Brown. ss. The United States of America, to the Sheriff of the county aforesaid, greeting: Whereas, judgment against Joseph Dickinson, was recovered by David A. Comstock and Robert W. Andrews, in the district court of the United States for the county of Brown, at the May term, one thousand eight hundred and thirty-eight, at the suit of the said David A. Comstock and Robert W. Andrews, aforesaid, for the sum of three hundred ninety-three dollars and 18 cents damages,

and three 93-100 dollars costs of suit by the said, in this behalf expended, whereof execution remains. These are, therefore, in the name of the United States of America, to command you that you levy distress upon the goods and chattels of the said Joseph Dickinson, as aforesaid, excepting such as the law exempts, and the want thereof, of his lands and tenements, and make sale thereof according to law in such cases made and provided, to the amount of said sums, and of the same so made, make due return within sixty days. Hereof fail not. Witness the Hon. ANDREW G. MILLER, judge of our said court, this fifteenth day of June, A. D. 1839. GARDNER CHILDS, Clerk.

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Nov. 27, 1839.—Received of Chas. Tuller, Sheriff, satisfaction in full of this execution. B. SHACKLEFORD, Pl'ffs' Att'y."

Indorsement on same execution:—"David A. Comstock and Robert W. Andrews vs. Joseph Dickinson. *U. S.'s District Court, May Term, 1839.* Execution issued 15 June, 1839.

Damages,	.	.	.	.	.	.	\$393 13
Cost,	.	.	.	.	.	.	3 93
This Ex.,	.	.	.	.	.	.	68
							<hr/>
							\$397 74

Int. from 30 May, 1838; returned Nov. 28, 1839, at 9 o'clock, A. M. B. SHACKLEFORD.—This execution satisfied in full. CHAS. TULLER, Sheriff."

The defendant then offered in evidence a sheriff's deed for the premises in question, to Daniel Whitney, executed by Charles Tuller as late sheriff of the county of Brown, dated December 6th, 1841, and duly recorded, reciting a sale of said premises under an execution issued out of the district court of the county of Brown, in a cause in which Comstock & Andrews were plaintiffs and Joseph Dickinson defendant, commanding him to make the damages named in the judgment, of the personal property, or in default of that, of the real estate of J. Dickinson. To the admission of this deed in evidence the plaintiff objected, because—1st. The execution upon which the land was sold was void. 2d. It does not

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appear that any certificate of sale was ever executed and filed according to the statute. 3d. It does not appear that the premises were ever sold. 4th. If sold, it does not appear that the time for redemption had elapsed from the time of sale to the execution of the deed; which objections were overruled by the court, the plaintiff's counsel excepting thereto, and the deed was read in evidence.

Thereupon the counsel for the plaintiff offered to prove by the administrator of Joseph Dickinson, that the sale to Whitney, by the sheriff, if any, was made without his consent, and without the judgment being revived by *scire facias* or otherwise, against him or against the heirs; that the administrator allowed the time for redemption to expire under an agreement with Whitney that he could redeem it at any time by paying ten per cent. interest thereon, and that the administrator never abandoned the claim of the heirs to said lot 28; that he consulted eminent counsel thereon years before the sale to the plaintiff, and was advised that the title to the premises was in the heirs, notwithstanding the sale to Whitney, if any there was; to the introduction of which evidence the defendant objected; the court sustained the objection, and the plaintiff excepted.

Verdict and judgment for the defendant, from which the plaintiff appealed.

James H. Howe, for appellant:

1. At common law a judgment upon which no execution had issued, must, after the death of the defendant in the judgment, be revived by *scire facias*, first against the personal representatives, and, if no assets can be found in their hands, then against the heirs and terre-tenants. *Pennoir vs. Brace*, 1 Salkeld, 820; 2 Tidd's Pr., 1119; Foster on Scire Facias, 71 Law Lib., pp. 2-99; 2 Wms. on Ex'rs, 1700; 3 Bac. Abr., 404.

2. An execution issued without such a revivor, is void at common law, and a sale of real estate under it passes no title. *Heapy vs. Parris*, 6 Durn. & East., 368; *Hildreth vs. Thompson*, 16 Mass., 191. Writs of *elegit* could not issue in England without writs of *scire facias*, to revive them, against the heirs and terre-tenants. 2 Saunders, 50 and 124.

3. These rules of the common law were not repealed by

the statutes of Michigan, in force in this state in 1838. [The argument on this point by the counsel on both sides, is omitted, as the court declined to re-examine the law upon that subject as settled in 6 Wis., 410.]

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4. There never was any judgment against Joseph Dickinson. The book from which the judgment (so called) was copied, was authenticated only by the fact that it was found in the office of the clerk of the circuit court. The entry is not signed by any person, and there were never any pleadings in the cause, nor any record made of it. The judgment is in favor of "Pl'f D. A. C. & R. A.," and against "Def't J. D.," and is void for uncertainty.

5. The court erred in admitting the sheriff's deed without any proof that any certificate of sale was ever executed and filed according to the statute, or that the premises were ever sold, or that before the execution of the deed the period limited for redemption had expired. Where one has a special statute authority to convey lands on doing certain previous acts, the purchaser must show that *all* those acts have been performed, independent of the recitals in the deed of conveyance. 7 Cow., 88; 4 Wheat., 77; 12 Wend., 74; 16 id., 563; 2 John., 280; 12 id., 213; 7 id., 535; 2 Starkie, 199; 11 Wend., 422; 1 Bing., 209; 1 Cow., 622.

6. The court erred in excluding the evidence offered, that the administrator allowed the time for redemption to expire under an agreement with Whitney for the redemption at a future time on the payment of ten per cent. interest, and that the claim of the heirs to the premises was never abandoned.

E. H. Ellis, for respondent:

1. The judgment was properly admitted. The book in which it was found purported to be a record of judgments in the district court of the United States for Brown county. It plainly shows a judgment in favor of David A. Comstock and Robert W. Andrews against Jos. Dickinson, and although not signed, must be presumed to have been duly rendered by the court, and recorded by the clerk. *Briggs vs. Clark*, 7 How., (Miss.), 457; *Pender vs. Felix*, 2 Smedes & Marsh., 535; *Coleman vs. McKnight*, 4 Mo., 83; *Venable vs. McDonald*, 4

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Porter vs. Brisbane, 1 Brevard, 381; *Cash vs. Lyle*, 2 id., 183; *Gayle vs. Foster*, Minor, 125; *Matthews vs. Thompson*, 3 Ham., 272; *Ordinary vs. McClure*, 1 Bailey, 7; *Kellogg, ex parte*, 6 Vt. 509; *Egerton vs. Hart*, 8 id., 207; *Doe vs. Greenlee*, 3 Hawks' Rep., 281, cited in 4 Phil. Ev., Cow. & H.'s notes, p. 286, *Vilas vs. Reynolds*, 6 Wis., 228, and cases there cited.

2. The execution was properly received in evidence. The omission of the sheriff to set forth a levy and sale in his return cannot affect the purchaser. *Wheaton vs. Sexton*, 4 Wheat., 506; *Voorhies vs. Bank of U. S.*, 10 Peters, 477; *Gates vs. Gaines*, 10 Vt., 346; *Barnes vs. Barnes*, 6 id., 388; *Clark vs. Foxcroft*, 6 Greenl., 296; *Sanders' heirs vs. Norton*, 4 Monr., 464.

3. The sheriff's deed was properly admitted. If no certificate of sale was ever executed and filed according to the statute, the purchaser is not prejudiced. *Jackson vs. Young*, 5 Cow., 269; *Jackson vs. Page*, 4 Wend., 590; *Carson vs. Doe*, 6 Smedes & Marsh., 111. The time for redemption had expired before the date of the execution of the deed. In support of the deed counsel also cited *Sumner vs. Moore*, 2 McLean, 59; *Jackson vs. Roosevelt*, 13 John., 97; *Jackson vs. Bartlett*, 8 id., 361; *Owen vs. Simpson*, 3 Watts, 87; *Bishop vs. Gregory*, 5 B. Monroe, 359; *Mitchell vs. Evans*, 5 How., (Miss.) 548.

4. The plaintiff's offer to prove that the administrator allowed the time for redemption to expire under an agreement with Whitney, was properly rejected, because it does not appear that the administrator ever tendered to Whitney the amount alleged to have been agreed upon for the redemption, and this after a lapse of seventeen years from the time of sale; and because the administrator had no authority to make such an agreement; and because the agreement was not in writing, as required by the statute of frauds. Stat. Wis. Ter., 1839, p. 102, § 8.

5. In the cases cited from 1 Salkeld, and 6 Durn. & East, the executions were held to be erroneous and irregular but not void. Where executions have been irregularly or erro-

neously issued, the courts have uniformly held that although they might be set aside *before* a sale of real estate under them, yet *after* sale the purchaser acquires a good title, the executions in such cases being not void, but voidable merely. *Speer vs. Sample*, 4 Watts, 367; *Jackson vs. De Lancy*, 13 Johns. 549; *Bennett vs. Hamill*, 2 Schoale & Lefroy, 566.

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By the Court, DIXON, C. J. We have been strongly urged to overrule the former decision of this court in this case, as to the effect of the statute of Michigan in dispensing with the necessity of a *scire facias* in order to give any validity to the execution sale under which the respondent claims title. But whatever might be the opinion of the court as now constituted, upon that question, were it for the first time presented, we are not inclined to re-examine the decision already made, upon which there was a motion for re-hearing argued and overruled. The question arose under an old statute no longer in force, and is not likely to arise again. And such being the case, we do not think the occasion justifies us in re-examining for the purposes of this case only, a question which has been once solemnly decided by the court, and that decision adhered to upon a motion for re-argument.

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This leaves the single question, whether the record of this judgment was properly admitted in evidence on the last trial. The book was found in the proper custody for the records of the court. It purported to be such record, and the only ground of objection seems to be that it was not authenticated by the signature of the judge or clerk. It is true there was a provision of the statute in force at the time, requiring the judge to sign the record at the end of each day's proceedings. But there is fair reason for saying that this provision was directory, and that it was not intended that its non-observance should invalidate the judgments. We have been at some pains to inform ourselves as to the practice from those familiar with it at that early day, and among others from one of the judges of that district, and we learn that this provision of the statute was then regarded as directory, and that owing to the inability of the clerk to complete the record of each day's proceedings in time, its observance was often ne-

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glected. Under these circumstances we must hold the record sufficient. In addition to the authorities cited by the respondent's counsel, the following may be referred to in support of its admissibility, *Boston vs. Weymouth*, 4 Cush., 542; *Read vs. Sutton*, 2 Cush., 115. In the latter case the docket entries, which were not authenticated in any other manner than in this case, were held admissible as evidence and entitled to the same effect as a full record, the full record not having been perfected at the time. The court said: "The docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is a statement of the act of the court, and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice, which presupposes such order."

The judgment must be affirmed, with costs.

12	276
84	647
12	276
90	606
12	276
98	353
12	276
106	239
12	276
109	245
12	276
112	473
12	276
54	721n

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In an action for breach of a contract to make and set up on a steam boat, engines, &c., suitable for propelling the same, averments in the complaint that the defendants failed to complete the work by the time specified in the contract, by reason of which the plaintiff was deprived of the earnings of the boat during the period of such delay, and that upon trial the engines, &c., proved unsuitable and defective, by reason of which the plaintiff was compelled to expend large sums in repairs and was deprived of the use of said boat while making the same, and finally was obliged to remove said engines from the boat, and purchase and put in new ones at a large expense, and lost the earnings of said boat during the time necessary to make such change, and lost also the wages of officers and hands employed on the boat during the time so spent in making repairs and changes, are not statements of several distinct causes of action, or of separate demands upon different contracts, but of several breaches of one contract, and the plaintiff may at the trial give evidence concerning any or all of them.

In an action on such a contract, the complaint failed to describe the contract truly, by omitting a stipulation therein that if the work should in any manner fail to answer the purposes intended, or prove defective on a trial of twenty days under an engineer approved by one of the defendants, it was to be made good by repairs of defects: *Held*, that under the present system of

pleading and practice, the variance was properly regarded as immaterial, it appearing that a copy of the contract as proved was served upon the defendants' attorney some months before the trial, so that he could not have been misled or taken by surprise.

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Where a complaint alleges that defendants are partners, and they fail, within the time allowed by law for an answer, to deny by affidavit the existence of the partnership, in accordance with the statute (sec. 98, chap. 127, Stat. 1858), they must be deemed to have admitted it.

A deposition should not be suppressed or excluded for want of a venue, or statement of the place where it was taken, either in its caption or in the certificate of the commissioner before whom it was taken.

It is no objection to a deposition, that it was reduced to writing by the deponent instead of the commissioner before whom it was taken.

A copy of a contract between a deponent and one of the parties to the suit, annexed to the deposition as an exhibit, is not admissible in evidence against such party, unless the non-production of the original is sufficiently accounted for; but the exhibit may be rejected and the testimony of the witness as to other matters be received.

It is a general rule, that depositions reduced to writing by the deponent, or by a party to the suit or some third person, in advance of the examination before the proper officer, or copied from such previously written statement, must be rejected; but where the deponent is a party defendant to a suit, with the fact of partnership between him and the other defendant admitted by the pleadings, a paper signed by him and annexed to his deposition as containing a correct statement of a verbal contract made between such partnership and the plaintiff, may properly be received in evidence as an admission in writing by one of the partners, of the terms of such contract, although it appear that such paper was written by the plaintiff and sent to the witness, before his examination; that fact, at most, only going to the credit of the witness.

In executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the articles delivered shall answer the purpose for which they were designed.

In case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning it or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages; or if sued for the price may set up and have such damages allowed to him, by way of recoupment, from the sum stipulated to be paid.

The dictum in *Gatty vs. Rowntree*, 2 Chandler, 23, that where there is a warranty, but no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid, and that in such case his only remedy is by suit for damages, or by recoupment, in case he is sued for the purchase money, is commented upon in this case.

Where a contract to furnish and put up engines suitable for a certain boat, contained a stipulation, that if the work should prove defective or fail, on a trial of twenty days, to answer the purposes intended, it should be made good by repairs of defects, the right of the purchaser to recover damages on account of such defects does not depend upon his returning, or offering to return the articles furnished.

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Under such a contract the right of the vendor or manufacturer to repair the defects, was limited to such defects as disclosed themselves within the twenty days allowed for such trial.

Where the plaintiff in a suit on such contract, offers proof tending to show that when the machinery was put in operation, it did not answer the purposes for which it was intended, the defendants have a right to meet that proof by evidence that it was the weakness of the boat, and not their defective or unskillful workmanship, which caused the failure in the operation of the machinery.

A stipulation in such contract to furnish "machinery adapted to, and suitable for the boat, and that would drive her from 12 to 15 miles per hour," does not import any warranty, by the vendors, of the strength and capacity of the boat to endure the weight, shocks and friction of the machinery when in motion, but an obligation only to furnish machinery adequate to run a boat of such size and dimensions at the proposed speed, the purchaser taking the risk whether the boat is sufficiently strong for such machinery.

If the machinery furnished under such contract was not delivered as soon as the contract required, and then proved defective and inadequate for the purpose, after the trial provided for in the agreement, and the vendors refused to make the repairs necessary to adapt the machinery to the purpose intended, the rule of damages is the difference in value between the machinery furnished and that called for by the contract, adding thereto the expenses which the defendant has actually incurred in his business as a consequence of the failure of the defendants to perform their contract, which would include the wages and board of the officers and crew for the time they necessarily remained idle during the delay in furnishing the machinery, and during the time lost by breakages while testing the same, and during such reasonable time as was required for repairing it, or for procuring new and suitable machinery in its stead, if necessary, to which also may be added interest.

APPEAL from the Circuit Court for *Brown County*.

The complaint alleged, that on the 15th of May, 1855, the defendants, *Tank* and *Verbeck*, were partners, under the name of the "Howard Foundry," and in that name, in consideration of \$5,300, to be paid, one-fourth as defendants should require it during the progress of the work therein-after named, one-fourth after the same was duly completed, tried and approved by the plaintiff, and the balance in three and six months thereafter, agreed with the plaintiff to construct and set up on the steamboat, "*Fannie Fisk*," two steam engines and boiler, with shafts, smoke pipe, pump and all the usual fixtures and appurtenances, of sufficient power to propel said boat on the waters of Green Bay and Fox River, from twelve to fifteen miles per hour, and to be in

all respects suitable for propelling said boat on said waters, for which the same was expressly designed and built by the plaintiff, and to have the same completed and ready for use on the 1st day of August of that year; that the plaintiff had performed all things which, by said agreement he was required to do; yet the defendants had failed to comply with their agreement, and did not get said engines, &c., ready for trial until the 18th of April, 1856, by reason of which the plaintiff was deprived of the earnings of said boat from the 1st of August, 1856, until that date, which would have exceeded \$3,000; that upon trial said engines proved so unsuited to the purpose for which they were intended, by reason of their unskillful design and construction, that the plaintiff was obliged to expend \$1,000 in repairs thereof, and for more than forty days, between said 18th of April, and the 15th of July ensuing, was deprived of the earnings which he would otherwise have derived from the use of said boat, exceeding \$1,000; and on said last mentioned day, was obliged to lay up said boat, remove said engines therefrom, and expend \$3,000 in purchasing and setting up new engines for the same, and \$1,000 in necessary alterations in said boat, occasioned by the change of said engines, and for the space of forty-nine days necessarily consumed in procuring and setting up such new engines, was deprived of the earnings which he ought to have derived from the use of said boat, amounting to over \$1,224; that the pump placed in said boat by the defendants, was utterly worthless to the plaintiff, and before he could use the boat, he was obliged to place a new steam engine and pump therein, at an expense of over \$250; that the plaintiff, relying upon the agreement of the defendants, employed officers and hands upon said boat, and was obliged to pay them during the time it was thus unemployed, for wages and board, over \$1,000; wherefore he demanded judgment for said several sums, with interest.

The answer of the defendant *Tank*, denies that he was at any time a partner in trade with said *Verbeck*; but alleges that in September, 1854, he leased the said "Howard Foundry" to said *Verbeck*, who then took possession thereof, and commenced doing the business of a machinist and en-

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gine builder therein, and that the promises in the complaint mentioned, if made, were made by said *Verbeck* alone, and not jointly with said *Tank*. The defendant, for further answer, alleges upon information, that said *Verbeck* did agree to construct and set up in said steamboat, "*Fannie Fisk*," two vertical steam engines, with their boiler, &c., of sufficient power for a boat of its size and tonnage, and that the same were ordered by the plaintiff for that boat, and were intended by him to be used in propelling it on the waters of Green Bay and Fox River, but denies that *Verbeck* undertook to construct said engines, &c., of sufficient power to propel said boat on said waters, from twelve to fifteen miles per hour, and denies that *Verbeck* undertook that said engines, &c., should be suitable for propelling said boat in said waters, but, on the contrary, avers that said *Verbeck's* undertaking was to construct and set up engines, &c., of sufficient power to propel said boat with the usual rate of speed on said waters, and that the same were to be in all respects suitable for propelling said boat on said waters, provided the hull of said boat was sufficiently strong to bear the weight, power and friction of said engines and other machinery.

The answer further states, that about the 10th day of August, 1855, the plaintiff, for a sufficient consideration, agreed with *Verbeck* to extend the time for the completion of said engines, &c., until the same could be completed by reasonable diligence; that by a further change of the agreement with *Verbeck*, the plaintiff furnished the boiler for said boat, at a cost of \$2,284, at his own risk; that *Verbeck* caused said engines, &c., to be completed, and set up on said boat, on the 17th day of December, 1855, which was as soon as the same could reasonably be done; that said boat then made her trial trip on the waters of Green Bay and Fox River; that said engines, &c., were then accepted by the plaintiff; that said boat continued to run on said waters until the close of navigation of that year, and was then laid up for the winter; that at the opening of navigation in the spring, said engines, &c., underwent the usual repairs in such cases required; that said boat began to run her regular trips about the 3d of April, 1856, and continued to do so until about

the 26th of that month, when, by reason of the straining and shaking of the hull of said boat, the entablature of said engines became broken while said boat was running upon Green Bay; that said boat was then repaired, and a new entablature placed therein, with additional braces and bands for the support of said engines, &c.; that said repairs were completed about the 13th of May, 1856, from which time until the 15th of July ensuing, said boat ran her regular trips, during all which time said engines, &c., continued in good order; and that the defendant was not notified by the plaintiff, on or before the said 15th day of July, of any break or defect in said engines, &c., or of the intention of the plaintiff to have the same removed from said boat. The answer further avers, that the hull of said boat was built in the year 1850, solely for river navigation, and was wholly unfit for the navigation of Green Bay; that the engines, &c., furnished for said boat by *Verbeck*, were constructed and put up in a workmanlike manner, according to his contract; that the same were sufficient to propel said boat, or any boat of equal size and tonnage, through the waters of Green Bay about twelve miles per hour; and that any failure to make that speed, and all the injuries which said engines, &c., sustained, did not result from any defect in the construction or setting up of the same, but were solely caused by the want of strength in the hull of said boat, to bear their weight, pressure and friction while navigating the waters of Green Bay; for which reason only the plaintiff caused said engines, &c., to be removed from said boat. The answer also denied all the allegations of the complaint not specifically admitted, and averred that there was yet due and unpaid of the said \$5,800, the sum of \$900, which said *Verbeck* had assigned to the defendant *Tank*, and for which he demanded judgment. Neither the complaint nor answer was verified.

After the jury had been empanelled, the defendant moved that the plaintiff be compelled to elect which of the claims mentioned in the "first cause of action" stated in the complaint, he would rely upon, which motion was denied by the court, and exception duly taken.

The plaintiff offered in evidence a deposition of the de-

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defendant *Verbeck*, taken under a commission issued out of the circuit court for Brown county and directed to Henry H. Bostwick, a commissioner for the state of Wisconsin, residing in the city of Auburn, N. Y. The caption of the deposition was as follows: "Brown County Circuit Court. Answers made by *Guido F. Verbeck*, of the city of Auburn, in the state of New York, a witness sworn and examined, under and by virtue of the annexed commission, before Henry H. Bostwick, residing in the city aforesaid, the commissioner therein named, in a certain cause now pending, &c;," and the certificate of the commissioner was in the following words: "I do hereby certify that the foregoing answers were made by *Guido F. Verbeck*, after being first duly sworn according to law, to the several interrogatories, cross-interrogatories, &c., in this commission, as therein set forth, and that the same was this day done before me in accordance with the requirements of said commission.

H. H. BOSTWICK, Commissioner.

"Auburn, Sept., 25th, 1858."

The witness, in answer to interrogatories by the plaintiff, referred to several papers as annexed to his deposition and marked respectively, A, B and C. The paper marked A, was in the handwriting of the witness, being the estimate referred to in the first clause of the agreement set forth in the paper marked C. B was a copy in the handwriting of the witness, of contracts alleged to have been entered into between *Tank* and *Verbeck*, on the 26th of September, 1854. These contracts were: 1st. A lease from *Tank* to *Verbeck*, of the Howard Foundry for the term of one year, *Verbeck* agreeing to carry on the business to his best ability, and to pay interest at seven per cent. for the capital invested. 2d. An agreement purporting to be signed by said *Tank* and *Verbeck*, in which, after referring to said lease, it is said, "We have the following understanding, which we will faithfully keep: the interest on the whole capital being heavy, the first party (*Tank*) promises not to count this against the second party, (*Verbeck*,) if the business not proves to be able to pay it after the second party has counted one and a half dollars a day for his services; if it however does well

and can pay the interest out of the profits, *G. Verbeck* shall next count himself three dollars per day, and what may be over shall be equally divided."

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The paper marked C was as follows: "Memorandum of verbal contract entered into and made on the part of *Guido F. Verbeck* on the part of the Howard Foundry, and *Joel S. Fisk*, in the month of May, 1855. First. Said *Fisk* applied to said *Verbeck* for an estimate for what he would set up in the steamboat called *Fannie Fisk*, an engine, boiler, &c., upon which said *Verbeck* presented the following estimate of cost of a steam engine, boiler, &c.: [here follows a description of them;] engine, boiler, shaft, &c., complete, to be put up on board the boat in running order, at the foundry dock, for \$4,500, payable one fourth down, one fourth twenty days after running, one fourth in three months after second payment, and one fourth six months after second payment. Second. That said *Verbeck*, after presenting the foregoing copy of proposition to said *Fisk*, proposed to put into said boat a different kind of machinery, viz, two perpendicular engines of 16 in. bore and 30 in. stroke, for an additional sum of \$800, making \$5,300 for all complete. Said *Fisk* replied that he knew nothing about steamboats or engines; that there was the boat, and all he wanted was machinery adapted to and suitable for the boat, and that would drive her from 12 to 15 miles an hour, but would be satisfied with 12 miles regular speed; that the payment of 1-4 down was changed, to be paid as should be drawn for by said *Verbeck*, at Howard Foundry, in merchandise and cash, as wanted, as the work progressed. Third. That said *Verbeck* agreed, on the part of the Howard Foundry, to make, furnish and put into the steamer *Fannie Fisk*, the machinery, &c., proposed by him, for the sum of \$5,300, and to be completed by the first of August, 1855, to answer all the purposes desired by said *Fisk*, payments as before stated; and should the work in any manner prove defective or fail, on a trial of 20 days under an engineer of *Verbeck's* approval or furnishing, to answer the purposes intended, it was to be made good by repairs of defects. Fourth. In the plan and construction of the machinery put into the steamer *Fannie* by me, on account of

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Howard Foundry, said *Fisk* never gave any orders or directions, but left it entirely to my judgment, he being satisfied if answering the undertaking. The above and foregoing is substantially the verbal agreement made by me on the part of Howard Foundry with *J. S. Fisk*.

Auburn, Dec. 22, 1857. (Signed,) GUIDO F. VERBECK."

This paper, the witness testified, was in the handwriting of the plaintiff *Fisk*, except the signature, which was his own; that the paper had been presented to him by *Fisk*, and he had signed it to show what the verbal contract was in relation to the engines and machinery.

The defendant *Tank* objected to the admission of said deposition in evidence, 1. Because there is no venue to the deposition. 2. Because the deposition does not state where it was taken. 3. Because witness could not be indicted for perjury. 4. Because deposition is in hand-writing of witness. 5. Because interrogatories are not propounded to the witness by the commissioner. 6. Because part of the deposition is in the hand-writing of the plaintiff *Fisk*. 7. Because copies are attached to the deposition, while the originals are unaccounted for. The court overruled the objections, the defendant excepting, and the deposition, including the exhibits, was read in evidence.

The defendant's counsel objected to the interrogatories propounded by the plaintiff in relation to the several papers marked A, B and C, and to the introduction of those papers in evidence, on the ground that they were immaterial and irrelevant. Against the admission of the paper marked C, they urged that it was not executed by any of the parties to the contract involved in this suit; that it was not the contract made between *Fisk* and *Verbeck* or the Howard Foundry; and that said paper was drawn up upon the part of the plaintiff, in this state, and forwarded to the witness, for the purpose of making evidence against the defendant *Tank*, and in favor of the plaintiff. But the court overruled the objections, and the defendant excepted.

The deposition of *Verbeck*, so far as it is deemed necessary to state it here, was, that from the 26th of September, 1854, until about the 20th of July, 1855, he was engaged in the

Howard Foundry as lessee and partner of *Tank*, under the firm name of the Howard Foundry; that the paper produced by him, marked C, is a full and true statement of the contract under which said engines were furnished; that *Fisk* had paid over \$4,500 on the contract, and pretty nearly the amount agreed upon; that he, *Verbeck*, proposed the change from a horizontal engine to two vertical engines; that he had opportunity to examine the boat before constructing said engines; that the bulkheads were taken out and keelsons put in, and the sides of the boat planked in arches, and hog-chains placed under the deck, by his advice, to fit the boat for vertical instead of horizontal engines; that the machinery was completed and set up in the boat so as to be ready for a trial trip, about the 15th of November, 1855, and finally completed ready for running, about the 19th or 20th of April, 1856; that the next day after the delivery of the boat, he left Green Bay, and has been absent ever since; that *Fisk* gave no orders or directions as to the manner in which the engines should be constructed; that the time for the second payment was fixed at twenty days after delivery, in order to give time for trial of the machinery; that the trial of said machinery was made under John Longworth, an engineer recommended by him; that the trial trip was made in November, 1855; that the plaintiff received the boat and machinery from his hands about the 20th of April, 1856; that the witness did guarantee that the engines should be suitable for said boat, no mention being made in the contract of the strength of the boat; that he did not agree to take on himself any responsibility as to the fitness of said boat, in point of strength, to bear the working of said engines; that said engines were properly constructed, so far as he had any personal knowledge; that they were manufactured in a good, workmanlike manner, and were intended to be suitable for said boat, and that the plaintiff did not accept the engines, or express any dissatisfaction with them, on the trial trip.

The plaintiff also introduced proof that after the boat was delivered to him for use in April, 1856, breaks occurred in the machinery so often that between that time and the 15th

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of July following the boat was laid up between thirty-five and forty days for repairs; and on the day last mentioned the engineer, John Longworth, refused to run it any longer, and it was laid up and the engines taken out. Proof was introduced on the one side to show that the breakage of the machinery was owing to defects in its design or construction, or in the mode of setting it up, and on the other side to show that it was owing to the defective construction of the boat and its want of strength to bear the weight, &c., of the machinery necessary to propel it, at the rate of speed required, in the waters of Green Bay. As tending to prove the latter it was shown that the hull of the boat was built for the purpose of navigating Fox River and not for the navigation of Green Bay. Some evidence was also given for the purpose of showing that *Verbeck* caused some alterations to be made in the boat to fit it for vertical engines, which alterations it was contended reduced its strength. It was proved that after the plaintiff removed the vertical engines from the boat, he procured from New York, in their stead, a pair of horizontal engines, at a cost of about \$3,000, including freight and travelling expenses of himself and his engineer, and the expense of setting up the new engines and of preparing the boat to receive them. It appeared, also, that the new engines were of one-third or one-fourth more power than those removed; and some evidence was given tending to show that when they were put in, some alterations were made in the boat, so as to increase its strength. There was also some proof tending to show that the engines built by *Verbeck* were of sufficient power to propel a boat of the size, &c., of the "Fannie Fisk" through the waters of Green Bay at the rate of speed required by the contract, provided such boat were strong enough to sustain the weight and pressure of the machinery. Some evidence was adduced for the purpose of showing that the first engines might have been secured in the boat in a different manner, at a moderate expense, so as to obviate the danger of breakage, and some evidence also upon the question whether, according to the common usage and course of business, it was the province of the machinist or of the employer or his ship carpenter to determine the strength

of the boat and its sufficiency for the machinery to be placed therein. It was also in proof that a portion of the machinery furnished by the Howard Foundry was still left in the boat and used in connection with the new engines, to wit, the boiler, smoke pipes, stay-rods, flanges, pillow-blocks, ex-centrics, connecting rods, steam pipe, and perhaps some other parts. There was also proof that in June, 1856, (before the vertical engines were taken out), the captain of the boat, in the absence of *Fisk*, applied to *Tank* to make some repairs of the machinery, and he at first replied that he would make no more repairs upon the boat unless *Fisk* would pay for them, but afterwards, on the same day, promised to make the repairs without charge. The plaintiff *Fisk* testified in regard to the repairs of the machinery, in substance as follows: "About the latter part of June, 1856, I went to *Tank* to see if I could get the machinery repaired. He complained that he had lost a good deal in building it and that I still owed him a balance upon it, and said he would not throw away any more in work upon it, nor allow anything more done in the foundry for the boat unless I would pay the bill every night. I asked him if he would allow the foreman to make the repairs I wanted *then*, if I would pay the bill, and he assented and set the men at work. At that time I insisted on his making repairs without cost to me, and he insisted that the engines had been delivered and that he was not liable to make the repairs; that the engines were built by *Verbeck*, and he had nothing to do with the contract and had lost enough by it. I don't think I told *Mr. Tank* I should return the machinery to him, nor that I should return it to the Howard Foundry. I told him if he would not make the machinery work, I should have to throw it out, and claim damages from him." *Fisk* also testified that *Tank* had presented to him a bill for repairs to the machinery, made between the 18th of April and the 12th of July, 1856, amounting to \$631 63, and added: "I have not distinctly paid him. I have accounts against him. Have not paid the balance claimed on the machinery; have always claimed there was no balance." In reference to the offer to return the old engines, *Mr. Fisk* testified: "I had repeated con-

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versations with *Tank* between the time of putting in the new engines and the commencement of this suit. I told him that he could send and get the engines, for they were of no use to me; that I thought he could fit them up and make them answer for stationary purposes, to sell them. I have always held the engines subject to *Mr. Tank*; always supposed he would take them. The last time I made this offer it was made in writing, and accompanied by a demand for \$3,000, as a settlement." There was also proof showing that during the delays caused by the breaking of the machinery, and during the time spent in procuring and setting up the new engines, the officers and crew of the boat were under pay, and showing the amount of wages paid to them by the plaintiff during such delays.

At the time the testimony on the part of the plaintiff was closed, the counsel for the defendant *Tank* moved for a judgment of non-suit, which motion was overruled and exception duly taken. The reasons assigned for the motion, being stated at length in the argument of counsel in this court as reported, are here omitted. When the testimony on both sides was closed, the defendant's counsel asked the court to instruct the jury as follows:

1. That the plaintiff is bound by his own proofs, and if such proofs disclose a contract which does not establish a partnership between the defendants, *Tank* is not liable to the plaintiff for any damages in this case.

2. That in that case there can be no partnership between the defendants, without either a positive and unconditional agreement to divide the profits of the business, or an actual division and enjoyment of such profits by and between the parties, and this the plaintiff is bound to prove.

3. That the lease and agreement referred to in the deposition of *Guido F. Verbeck* does not establish a partnership between the defendants, unless the jury find that at some time during the continuance of the lease and agreement, there was an actual communion or division of the profits of the business of the foundry between the defendants.

4. That the mere statement in the deposition of the defendant *Verbeck*, that he was a partner, or "a lessee and part-

ner" with *Tank*, is no proof, if the contract mentioned and referred to in the deposition does not create such partnership, or unless there was an actual division of profit between the parties.

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5. That if the contract proved shows that the defendants, or either of them, were to repair the defects in the engine, or if the contract proved shows that "should the work in any manner prove defective, or fail on a trial of twenty days, under an engineer of *Verbeck's* approval or furnishing, to answer the purposes intended, it was to be made good by repairs of defects," such a variance is material, and the plaintiff cannot recover in this action.

6. That the plaintiff is bound to prove that he has fulfilled and performed all the conditions of the contract on his part, and that without such proof the plaintiff cannot recover.

7. That if any part of the contract price for the engines in question remains unpaid, the contract is not *performed* by the plaintiff, and he cannot recover.

8. That if the jury find that the engines were accepted and reduced to use by the plaintiff, without notice that he would claim damages, such acceptance and use is a waiver of the plaintiff's right to claim damages for non-performance or mal-performance of the contract in this action.

9. That if the jury find that the plaintiff has paid the second installment of the contract price for the vertical engines, he must be deemed to have approved the work, and to have waived all right to claim damages resulting from defects in the machinery.

10. That if the jury find that the plaintiff has kept and retained any material part of the machinery manufactured by *Verbeck* and set up in the boat, he cannot recover in this action, the contract being entire.

11. That if the jury find that the defendants had no notice of the plaintiff's intention to take out the old engines and put in the new, between the time of *Mr. Fisk's* conversation with *Mr. Tank* (in which he told *Mr. Tank* that "if the old engines did not work, he would throw them out and get new ones," or words to that effect), and the time when the

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plaintiff took out the first engines, and that the defendant had no opportunity of putting in such new engines, or other new machinery, *during that time*, the plaintiff cannot recover the cost of putting in the new engines or new machinery.

12. That if the jury find that the plaintiff did not return, or offer to return the old engines, or any material part of the machinery, to the defendants, he cannot recover in this action.

13. That if the jury find that the plaintiff did not return, or offer to return the engines set up in the boat by *Verbeck*, before he incorporated the parts of the first machinery into the new engines, the plaintiff cannot recover the cost of such new engines, or the expense of setting up the same in the boat.

14. That an offer to return those parts of the first machinery which were taken out of the boat by the plaintiff, would be too late after he had taken and incorporated the parts retained by him into the new machinery.

15. That mere notice given by the plaintiff to the defendants, that they could have the property, or any part of it, if they called for it, does not amount to an offer to return.

16. That if the jury find that the plaintiff told *Mr. Tank*, that if the machinery would not work he would throw it out and claim damages, he imposed upon himself the duty to notify *Mr. Tank* that the machinery had failed prior to his taking out such machinery, and if he failed so to notify *Tank*, he cannot recover the cost of putting in such new engines.

17. That if the jury find that the breaks in the machinery were caused by the weakness of the boat, or partly by the weakness of the boat, and partly by defects in the design or construction of the machinery, the plaintiff cannot recover any damages for such breaks, or any expenses incurred in consequence thereof.

18. That if the plaintiff employed the defendants to make and set up the engines in question in a boat which was unsuitable, or too weak to bear the working of such engines, the plaintiff is in fault.

19. That the plaintiff was bound to use ordinary care in

ascertaining and assuring himself of the sufficiency of the boat, before the engines were put in it, and before contracting for the machinery; and if he neglected to take this precaution, and the damages are in any measure attributable to such neglect on his part, he cannot recover any such damages from the defendants.

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20. That if the jury have any doubts as to whether the fault is the plaintiff's or the defendants', with respect to any of the alleged injuries or claims, their verdict must be for the defendants, upon all claims thus doubtful.

21. It being proved and admitted that the new engines bought by the plaintiff are of one-third more power than the first engines, the defendants are entitled to a deduction of one-third of the price paid by the plaintiff for such engines, if the jury find the vertical engines were of sufficient power to propel the boat at the rate of speed required by the contract.

All of which instructions the court refused to give, and the defendant's counsel excepted.

The respondent's counsel asked the court to instruct the jury as follows:

1. That the plaintiff having alleged in his complaint that at the time he contracted with the Howard Foundry for the machinery for the steamboat Fannie Fisk, the defendants, *Tank* and *Verbeck*, were copartners, under the name, firm and style of the Howard Foundry, and that allegation not having been denied by the affidavit of the defendants or either of them, or by any one on their behalf, the jury must take that allegation of copartnership to be true, and must find that the defendants were copartners at the time stated in the complaint.

2. That if the jury find that the defendants were at the time of making the contract aforesaid, connected in business upon the terms of the agreements set forth in the deposition of the said *Verbeck*, those agreements constituted them copartners, at least as to persons contracting with the Howard Foundry, and the jury will so find.

3. If the jury shall find that the defendants were copartners as alleged in the complaint, then the defendant *Tank* is

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liable upon the contract set forth in the complaint, to the same extent that the defendant *Verbeck* is.

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4. If the jury should find that the defendants contracted with the plaintiff to make, construct, and set up in their proper places on the steamboat *Fannie Fisk*, the engines, boilers, smoke-pipe, shafts, pump, and all the usual and necessary fixtures and appurtenances for the same, of sufficient power and capacity to propel said steamboat in the waters of Green Bay and Fox River, at a speed of from twelve to fifteen miles per hour, and to be in all respects suitable and competent for working and propelling said steamboat on said waters; and should also find that the machinery furnished was not in all respects suitable and competent for working said boat on said waters, the defendants are equally liable for damages, whether the defects in said machinery arose from the faulty design or construction thereof, or from the defective manner of setting it up on board of said boat.

5. If the plaintiff ordered machinery of the defendants for a special purpose, and the defendants supplied and sold it for that purpose, the defendants are deemed in law to have warranted it to be fit for that purpose.

6. If it proved unsuited to the purpose for which it was ordered, or if any part of it was unsuited for that purpose, the plaintiff might either return, or offer to return, the whole property to the defendants, and thereupon recover the whole price paid for it, or he might retain such parts as were suited to the purpose for which the whole was ordered, and repair or supply such parts as were unsuitable for that purpose, and recover of the defendants the cost of repairing or supplying the defective parts.

7. If the jury shall find that one of the defendants was out of the country when any part of such machinery proved defective, and not in a situation to repair or supply the same, and that the other defendant refused to repair or supply the same, it was the right of the plaintiff to do so; and it was further his right to adopt the speediest and surest method of doing it which was known to him at the time.

8. If the jury should find that the defendants, in order to set up their engines, removed any of the timbers in said

boat, and thereby rendered her materially weaker, they are thereby estopped from showing that the failure of the machinery was owing to the weakness of the boat.

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9. If the jury find that said boat was capable of sustaining horizontal engines of equal power with the engines furnished by the defendants, set up as horizontal engines usually are set up, they will find for the plaintiff, notwithstanding they may believe that the vertical engines furnished by the defendants were sufficient to propel said boat if they had been differently set up, or if said boat had been differently constructed.

10. If the jury shall find for the plaintiff, they will assess to him, for his damages, besides the money expended by him for repairs of the defective machinery, all such sums as the plaintiff paid to the crew of his boat for their wages during the time the machinery was being repaired; and may also assess interest on such sums from the time they were paid.

The court gave the jury all of said instructions and the defendant's counsel excepted.

Verdict for the plaintiff for \$3,500. Motion for a new trial overruled, and defendant excepted. Judgment in accordance with the verdict, from which the defendant *Tank* appealed.

John C. Neville and *E. H. Ellis*, for appellant, in support of the objection taken to the deposition of *Verbeck*, on the ground that it is in the handwriting of the deponent, cited *Amory vs. Fellowes*, 5 Mass., 219; *Carmalt vs. Post*, 8 Watts, 406; *Bailis vs. Cochran*, 2 John., 417; *Armstrong vs. Burrow*, 6 Watts, 266. In support of the objection on the ground that part of said deposition is in the handwriting of the plaintiff, they cited *Clement vs. Hadlock*, 13 N. H., 185; *Amory vs. Fellows*, and *Carmalt vs. Post*, *supra*; 7 U. S. Dig., 225; 2 *id.*, 212.

II. The evidence offered by the plaintiff to show that, in place of the old machinery, new machinery was obtained, at a cost of \$3,000; that offered to show the delay of the boat in running, and the payment by the plaintiff of wages to hands, &c., from July 15th to September 2d; and that offered to show that the machinery was defective and unsuited

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for a boat like the Fannie Fisk, should have been ruled out, 1. Because it was not preceded by any proof that the plaintiff ever returned or offered to return the machinery alleged to be defective. He was bound to place the defendants in as good a condition as he could before incurring any such expense, and to give them a fair opportunity to supply any defects. *Dewey vs. Erie*, 2 Harris, 213; *Frankenfield vs. Freyman*, 1 id., 56; *Freeman vs. Clute*, 3 Barb., 424. The contract also provided that they should supply any defects in the machinery. If they failed to do this, the plaintiff's only remedy was a return of the whole property, and a recovery of the amount paid by him to the defendants. 2. The sum expended for new machinery is no proper measure of the plaintiff's damages, especially when that new machinery did not, either in design or construction, conform to the specifications of his contract with the defendants, and the new engines were of one third more power than those built by *Verbeck*. *Chitty on Con.*, 569, 741-3; *Freeman vs. Clute*, *supra*; *Sprague vs. Blake*, 20 Wend., 61. The plaintiff might have remedied the difficulties by setting up the first engines differently, and this, as the less expensive course, he was bound to adopt. *Chitty on Con.*, 872; *Miller vs. Mar. Church*, 7 Greenl., 51.

III. The court erred in denying the defendant's motion for a non-suit. 1. The proof does not establish a partnership between the defendants. *Stephens' Nisi Prius*, 3, 2380; *Coll on Part.*, 23 and § 85; *Story on Part.*, §§ 30-47. Having undertaken to show the actual arrangement existing between *Tank* and *Verbeck*, and this arrangement not constituting them partners, he cannot claim the benefit of the statute, which requires the defendants to deny the partnership by affidavit. 2. There is a material variance between the contract described in the complaint and that proved. 1 Greenl. Ev., §§ 63, 66, 68, 69; 2 Starkie on Ev., pt. 1, pp. 59, 60, and notes; *Ames vs. Ames*, 5 Wis., 160; 3 Wend., 374. 3. The plaintiff failed to prove full performance of the contract on his part, and it appears from his own showing that he has not paid the full contract price for the machinery in question. *Chitty on Con.*, 736, 743. 4. The machinery was

accepted and reduced to use by the plaintiff without any sufficient notice that he would claim damages. He paid the second installment of the contract price and approved the work. *Sprague vs. Blake*, *Frankenfield vs. Freyman*, and *Dewey vs. Erie*, *supra*; Chitty on Con., 459-61; *Perley vs. Balch*, 23 Pick., 283. 5. The plaintiff still retains in his possession the whole machinery, and in his use a large portion of the machinery specified in the contract, and has never returned, or offered to return, the same. See cases cited under the previous point. 6. The plaintiff put new engines into the boat without notifying or consulting the defendants, thereby abandoning the contract and all rights under it. Cases in Wend. and Harris above cited. 7. The plaintiff has so confounded the measure of damages by his own acts in taking out the old and putting in the new engines, that they cannot be ascertained by the defendants. 2 Para. on Con., 475-6; *Sprague vs. Blake*, *supra*.

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IV. The court erred in refusing to give the jury the several instructions asked for by the defendants. In support of the instructions thus refused respectively, counsel cited authorities as follows: For the first, *Rice vs. Austin*, 17 Mass., 197; Story on Part., §§ 30-47. For the second, third and fourth; Story on Part., §§ 35-47; Coll. on Part., §§ 25-35; for the fifth, 1 Greenl. Ev. § § 63, 66, 68, 69; 2 Starkie on Ev., pt. 1, pp. 59, 60, and notes; *Ames vs. Ames*, *supra*; *Stone vs. Knowlton*, 3 Wend., 374; *Penny vs. Porter*, 2 East, 2; *Hatch vs. Adams*, 8 Cow., 35; for the sixth, Chitty on Con., 242-3; for the seventh, *Lawrence vs. Simons* 4 Barb., 354; for those numbered from eighth to sixteenth, cases above cited from 1 and 2 Harris and 20 Wend., with 2 Para. on Con., 29-33, and notes; Chitty on Con., 458, 741-3, and notes; *Hills vs. Bannister*, 8 Cow., 31; 2 Kent's Comm., 480; for those numbered from seventeenth to twentieth, *Tonawanda R. R. Co. vs. Munger*, 5 Denio, 255; *R. R. Co. vs. Aspell*, 23 Penn. St., 147; *Brownell vs. Flagler*, 5 Hill, 282; *Brown vs. Maxwell*, 6 id., 592; *Hartfield vs. Roper*, 21 Wend. 616; *Spencer vs. Utica and S. R. R. Co.*, 5 Barb., 337; *Clark vs. U. and S. R. R. Co.*, 11 id., 112; *Haring's Adm'x vs. N. Y. & E. R. R.*, 13 id., 9; *Willet's Adm'rs vs. B. & R. R. R.*, 14

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V. The court erred in directing the jury to include in the plaintiff's damages, interest on all the expenses incurred by him in the purchase of new machinery, &c., up to the time of the trial. The boat began to run after the new engines were put in, about the 2d of September. Thus the plaintiff would have the use of the machinery in the boat, and interest upon its cost at the same time. Besides, it is well settled that interest is not recoverable upon unliquidated damages.

James H. Howe, for respondent:

I. At the date of the contract made by *Fisk* and *Verbeck*, *Tank* and *Verbeck* were partners under the name of "Howard Foundry." 1. The complaint so avers, and there is no affidavit by either of the defendants to sustain their denial, as required by statute. R. S., 1849, p. 528; R. S., 1858, p. 815. 2. The contract proved between *Tank* and *Verbeck*, made them partners *quoad* third persons. Coll. on Part., 22-43, and cases there cited; *Parsons* on Con., 131-136.

II. The jury have found that a contract was entered into substantially as set forth in the complaint, and that the respondent performed all the conditions precedent required of him by that contract.

III. The contract being an executory one, to manufacture and deliver articles for a particular purpose, there was an implied warranty that the articles furnished were suited to the objects for which they were furnished. 1 Pars. on Con., 468; *Jones vs. Bright*, 15 E. C. L. R., 529; *Brown vs. Edington*, 40 id., 661; *Olivant vs. Bayley*, 5 Q. B., 288; *Laing vs. Fidgeon*, 1 E. C. L., 531; *King vs. Paddock*, 18 John., 141; *Howard vs. Hoey*, 23 Wend., 349; 8 Blackf., 317. The defendants warranted that the machinery which they were to furnish should be *suitable* for the purpose of propelling *this particular steamer*, "Fannie Fisk," as she was through the waters of Green Bay and Fox River, at the rate of 12 to 15 miles per hour, in her regular business of navigating those waters.

IV. The jury have found that the engines set up on the

boat by the "Howard Foundry," were *unsuited* to the boat—were unskilfully designed and executed for the purposes intended. This precise question was left to them by the court below in the fourth and sixth instructions given.

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V. The machinery having thus proved insufficient, the plaintiff was at liberty either to return, or offer to return, the whole, and recover the whole price paid, or to retain such parts as were suited to the purpose, and repair or supply such parts as were unsuitable, and recover of the defendants the cost of such repairs, or of supplying the defective parts. 2 Smith's Leading Cases, p. 32, note; *Lyon vs. Bertram*, 20 How. (S. C.), 154; *Pateshall vs. Tranter*, 30 E. C. L., 39; *Voorhees vs. Earl*, 2 Hill, 288; *Dawson vs. Collis*, 70 E. C. L., 522; *Withers vs. Greene*, 9 How. (S. C.), 220-221. The right to return the property, on breach of warranty, in the absence of any express agreement to that effect, is denied in some of the cases. *Street vs. Blay*, 22 E. C. L., 122.

VI. One of the defendants being absent from the country and the other refusing to repair, it was the right of the plaintiff to adopt the speediest and surest method for repairing or supplying defective parts of the machinery, and to recover the cost of so doing. In the case of a sale of an article to be manufactured, the measure of damages for a breach of warranty is the amount required to make the article what it should have been. *Clifford vs. Richardson*, 18 Vt., 620; *Blanchard vs. Ely*, 21 Wend., 342; *Thompson vs. Shattuck*, 2 Met., 615; *King vs. Paddock*, and *Howard vs. Hoey*, *supra*. The main purpose of the contract was the erection, not of two vertical engines of a particular size and construction, but of engines *capable of producing a given result*. The defendants did not furnish them as they agreed; *Fisk* did furnish them. He now asks for compensation for so doing.

VII. The defendants, in setting up their engines, having removed a portion of the timbers, thereby making the boat materially weaker, were, upon that fact being found by the jury, estopped from showing that the failure of the machinery was owing to the weakness of the boat. The general rule is that when a party has been induced to act in a particular way by the statements or conduct of another, the lat-

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ter will not be permitted to contradict such statements or conduct, when it would tend to the injury of the person so acting upon them. 1 C. & H.'s notes to Phillips on Ev., 454-468; *Frost vs. Saratoga Ins. Co.*, 5 Denio, 154; *Hall vs. Fisher*, 9 Barb., 17; *Chautauque Co. Bank vs. White*, 6 Barb., 589; *Copeland vs. Copeland*, 28 Me., 525; 8 Wend., 481; 3 Hill, 215; 6 id., 534. In this case, when the defendants put in their vertical engines, the keelsons (pieces of timber running across the bottom of the boat, longitudinally, to strengthen her) were cut down in the middle, by *Verbeck's* orders, from a thickness of 14 inches to one of 3 inches. In reply to the position that the court should have let the evidence of the weakness of the boat go to the jury, counsel argued further, that *Verbeck* had ample opportunities to learn the true character of the boat before he commenced to put the engines in, and that his contract was to make engines suitable to the boat *as she was*.

VIII. The facts last mentioned justified the court below in refusing to give the 17th, 18th and 19th instructions asked by the defendants. This refusal is further justified by the fact that a false representation is nowhere set up in the answer, and was, therefore, not in issue. Again, the proof does not show that the plaintiff ever told the appellant where the boat was to run. The statement that the boat was designed and built by the plaintiff for the navigation of Green Bay is true. The hull, indeed, was built years before this contract, but the hull is only a small part of the completed boat. It was the finished article which the plaintiff designed for the bay trade.

IX. The refusal to give the sixth instruction asked by the defendants, was not erroneous. It has sometimes been held that before one can recover, on breach of contract, he must aver and prove the performance of conditions or covenants precedent on his part, but never the performance of *all* covenants or conditions. 2 Smith's Leading Cases, 24.

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By the Court, DIXON, C. J. The appellant's application to the court to compel the respondent to elect upon which of the claims stated in his complaint he would proceed, and to

abandon the residue, was properly denied by the court. The complaint is not, as seems to have been supposed by the appellant's counsel, either double or multifarious. It does not contain a statement of several distinct causes of action improperly blended together, or of separate injuries to different chattels, or separate demands upon different contracts, as upon two or more promissory notes, or a note and book account, or the like, but it proceeds for damages for several breaches of one contract. It is obvious that in such a case, the plaintiff may, either at common law or under the code, in a single statement or count, allege as many breaches as he chooses, and when he comes to the trial be permitted to give evidence concerning any or all of them.

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The deposition of the defendant *Verbeck* was properly admitted. The want of a venue or statement of the place where it was taken, either in its margin or the certificate of the commissioner before whom it was taken, does not invalidate it. It is said that without such statement perjury cannot be assigned upon it. The authorities cited by the respondent's counsel, clearly establish the contrary. They show that, upon a trial for perjury, when the venue is wrongly stated in the affidavit or deposition, such written statement may be disproved, and the true place of administering the oath may be shown by parol testimony. Such recital is not so much a part of the deposition or affidavit as to make it conclusive, but is *prima facie* evidence merely. *A fortiori* the true place may be shown where there is no recital. *King vs. Emden*, 9 East, 437; *Rex vs. Spencer*, 1 Carr. & Payne, 260 (11 E. C. L., 384). For all ordinary purposes the place of taking sufficiently appears on the face of it and the accompanying papers. In this respect it is in strict compliance with the rule (61 old Rules) which requires the return to state the time when the testimony was taken; but makes no reference to the place where it was taken. The objection that the deposition was reduced to writing by the deponent, instead of the commissioner, is not supported by the authorities cited. They only establish what is alike consistent with reason and justice, that depositions to be admissible, must be taken in the regular course of judicial examination—that the witness

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must be first duly sworn, and the questions put to him, and that his answers orally given must be reduced to writing at the time of the examination—and that if they be not so taken on oath, but are reduced to writing in advance of such examination, by the deponent, the party or some third person, or are copied from such previously written statement, they must be rejected. We are not aware that it has been held by any court that the reduction to writing by the deponent, of his answers orally given, vitiates the deposition. On the other hand, two of the cases cited, *Carmalt vs. Post*, 8 Watts, 406, and *Clement vs. Hadlock*, 13 N. H., 185, expressly sanction it. We can see no objection to it. Some courts have even gone as far as to hold that it is no objection to the competency of a deposition, that it is in the handwriting of the party or his agent; that it will be presumed to have been so written in the presence and under the superintendence of the magistrate. *Ray vs. Walton*, 2 A. K. Marshall, 71. This is going much further than is necessary to sanction the admission in the present case, and further, perhaps, than we would feel warranted in going. Our legislature, in prescribing the method of taking depositions of witnesses within this state (sec. 16, chap. 98, Statutes of 1849; sec. 16, chap. 137, Statutes of 1858), seem to have laid down a wholesome rule upon the subject—that *they shall be written by the magistrate or by the deponent, or by some disinterested person in the presence and under the direction of the magistrate.*

The objection that a part of the deposition is in the handwriting of the respondent, is unfounded in fact. The exhibits or papers annexed, strictly speaking, form no part of the deposition. The deposition, that is, the oral testimony of the witness as taken and reduced to writing, may be admitted, and the exhibits, if there be any thing in their character which renders them incompetent, may be excluded. The exhibit marked "B," being a copy of the original contract, the non-production of which was not sufficiently accounted for, was improperly admitted. As to the other exhibits, there seems to have been some confusion of ideas, owing to the mixed relation of party and witness, in which

the deponent *Verbeck* stood to the action. As a mere witness, there can be no doubt that such statements, whether offered in the form of exhibits annexed to a deposition, or in some other manner, are inadmissible. But in his character of a party to the suit, with the fact of partnership between him and the defendant *Tank* not open to investigation, but admitted by the pleadings, they were properly received as admissions in writing of the nature and extent of the contract. For this purpose the admissibility of a paper signed by him is not affected by the fact of its having been written by the opposite party, and such circumstance would, at most, go only to the degree of credit to be given to it, according to the nature and circumstances of the transaction. For the rule as to admissions by partners, see Collyer on Partnership, § 423, and authorities there cited.

The appellant, by his failure, within the time prescribed by law for an answer, to deny, by affidavit, the existence of the partnership as alleged in the complaint, in accordance with the provisions of sec. 90, chap. 98, Statutes of 1849 (sec. 98, chap. 137, Statutes of 1858), must be deemed to have admitted it. The statute declares that, in the absence of such denial, such averments shall be taken to be true. This court (*Whitman vs. Wood*, 6 Wis., 676) has so decided; and agreeably to that decision it only remained for the respondent to prove the making of the contract by the firm.

The only other question material to be noticed before we come to the merits of the controversy, is that of variance, which was raised on the motion for a nonsuit. It consists in the pleader's omission to allege in the complaint a part of the contract by which it was agreed that if the work should in any manner fail to answer the purposes intended or prove defective, on a trial of twenty days, under an engineer of *Verbeck's* approval or furnishing, it was to be made good by repairs of defects. The contract, in all other respects, is stated truly. Under the system of pleading and practice which prevails at the common law, there can be little doubt that this failure to prove the contract as laid would be fatal. But under the system now established by law, more liberal as well as more just rules

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obtain, and actions are not to be defeated by slight variances or imperfections in the pleadings. It is declared by statute, sec. 33, chap. 125, that "no variance between the allegation in a pleading and the proof, shall be deemed material, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. Whenever it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just." By the next section it is enacted that "when the variance is not material as provided in the last section, the court may direct the fact to be found in accordance with the evidence, or may order an immediate amendment without costs." It is not contended that the appellant was in any manner misled or taken by surprise. Indeed, the case shows that he could not have been, for it appears that a copy of the contract as proved, was served upon his attorney some months before the trial. It was then clearly a case of immaterial variance, which the court, under the section last quoted, might disregard, or order an immediate amendment without costs, in its discretion. It decided to pursue the former course, and over that decision we have no control.

Many of the principles applicable to the merits of this case, have been heretofore settled in this court, and it will, therefore, be unnecessary for us to consider them with reference to the adjudications of other states. In the case of *Getty et al. vs. Rountree et al.*, 2 Chandler, 28, the following points were decided:

1. That in executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the article delivered shall answer the purpose for which it was designed, inasmuch as the purchaser has not an opportunity of inspecting or testing it;
2. That in case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects,

bring his action for the recovery of damages, or if sued for the price, may set up and have such damages allowed to him by way of recoupment from the sum stipulated to be paid.

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These points were fairly raised, and, as we think, correctly decided. There was another point, however, not involved in the case, upon which the court attempted to rule, to which we do not wish to give our unqualified assent. It was said that where there is a warranty but no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid; that in such case his only remedy is by suit for damages, or by recoupment, in case he is sued for the purchase money. As applied to the facts of that case, provided the court had been called upon to determine whether the defendants had the right, at the time the action was commenced, to return the pump about which the suit arose, such decision might have been correct. There is, however, much reason for saying, and many respectable authorities hold, in respect to executory contracts particularly, that in addition to the remedies above stated, the vendee may, in case the warranty be not complied with, altogether refuse to receive the article; or may take and keep it for such time only as may be necessary for a fair examination, and then return it on discovering its defects; in which case he is not considered as having received it at all; and in either case, if he has paid for the same, may sue for and recover back the price. See note to *Cutler vs. Powell*, 2 Smith's L. C., 5th ed., page 82, and cases there cited. Upon this point we wish to express no opinion. We desire merely to reserve it. It was entirely outside of the case then before the court, and is equally so now; and, therefore, could not be adjudicated in either. No return, or offer to return the article purchased was there made, and no rights thereupon claimed; and the same is true here. With this exception, the decision meets our entire approval. The opinion exhibits a clear understanding and just discrimination of the authorities, and renders an examination of them here, upon the points properly determined, entirely unnecessary. This disposes of a large number of exceptions taken by the appellant's counsel, not necessary to be enumerated here, which are founded

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upon the supposed want of a return or offer of the machinery to the appellant, or of notice to him of its defects.

This case is not analagous to those cases, to some of which we have been referred, where, by the stipulations of the contract, or the course of dealing between the parties, the vendee is bound within a specified or reasonable time to return the property, with his dissent, or to keep it on the terms of the offer. In such transactions, the failure to return according to the terms of the agreement is an election to keep the property at the price agreed, and a waiver of all claim to damages on account of defects. Such was not the agreement between these parties. The sale in the first instance was absolute, provided the respondent chose so to consider it. His right to recover damages does not depend at all upon his returning or offering to return the articles purchased. If he could have done so, it would only have been necessary for the purpose of enabling him to recover back the purchase money paid and of relieving himself from future payments. He seeks neither of these things, but merely asks compensation for the losses sustained by a breach of the warranty.

There is another question with which the case seems to have been unnecessarily burdened, and from which we desire to relieve it as early as possible. It seems to have been supposed by both sides, that the respondent's right to recover depended in some way upon his neglect to call upon the defendants to make repairs, or their refusal to do so. With this idea proofs were offered, some of which were received and some rejected; instructions were asked, which were in part given and in part refused; and many exceptions were taken. If we rightly understand the contract, all these matters which had reference to the transactions between the parties *after* the expiration of twenty days from the time of the setting up and delivery of the machinery, were entirely foreign to the controversy. After this period the contract seems to have been treated as if it were still executory on the part of the defendants. This was clearly wrong. The terms of the agreement are too plain to be misunderstood. It was completely executed on the part of the defendants,

when the machinery was set up and delivered, except so far as they reserved the right to repair, if the work, upon trial in the manner specified, proved defective, the time for which was expressly limited to the period of twenty days. Without this stipulation the defendants would not have had the privilege of repairing, nor could the plaintiff have required it of them. The rights and obligations flowing from the stipulation were limited to defects discovered during the time fixed for the trial of the machinery. Thereafter the defendants were no more bound to repair the machinery than any stranger would have been, and the plaintiff was absolved from all duty of applying to them to do so, or giving them notice of its defects. If it then proved defective he was at liberty to get it repaired elsewhere, or not at all, as he pleased. He was not bound to repair it, or supply its place with other, in order to maintain his action. His right of action for damages in nowise depended upon his subsequent conduct, or that of the defendants, but accrued to him from a breach of the contract by the delivery of machinery the defects or unsuitableness of which had not been discovered and remedied in accordance with the stipulation.

In this connection it may also be well to notice two other principles of law sought to be applied to this case; the one that, in actions for injuries arising from the negligence and carelessness of another, the party seeking redress must be himself free from fault, and must not by his own want of care have contributed directly to the injury received; and the other, that a party who, by his declarations or conduct, has induced another to act in a particular manner, will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such person, commonly called an *estoppel in pais*. It appears to us that neither of these principles has any application to it. The former, as a substantive ground of defense, going to defeat the whole action, applies only to suits brought to recover damages occasioned by the negligent conduct of another, and does not apply to actions for a breach of contract like the present. The plaintiff seeks to recover damages by reason of the alleged failure of the defendants to set up and

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deliver such machinery as the contract called for; and as a mode of establishing such failure, he offers proof tending to show that when it was put in operation in the manner contemplated by the parties, it did not answer the purposes for which it was intended. This was a means of proof—a knowledge of facts derived from actual experiments—and, under the circumstances, perhaps the best which the nature of the case admitted of. As experimental knowledge it was liable to be fully and fairly scrutinized and tested on the part of the defendants. They had the right to know and to show whether or not the trial to which the machinery was put was fair and proper. The conclusiveness of the experiments, and the weight to be given to the evidence, depended upon this. Therefore the defendants were entitled to prove, if they could, that it was the weakness of the boat or the negligence or want of skill of the plaintiff or his agents, and not their defective and unskillful workmanship, which caused the unsuccessful operation of the machinery. They were entitled to do this, not because such weakness, negligence or want of skill, if shown, would have operated to bar the whole action, notwithstanding it might still appear that the engines were not in all respects suitable or such as the defendants agreed to furnish, but because it was a legitimate method of meeting, explaining or rebutting the plaintiff's evidence and exhibiting before the court and jury the real facts of the case. The plaintiff was not bound to the defendants to use any degree of care or skill in the use of his boat or machinery, or in the management of his business. They were matters which did not concern them and about which he could suit himself. His conduct in these respects only became the proper subject of investigation on their part, when he undertook to make it the means of showing that they had violated their contract, and then they might lawfully scrutinize it for the sake of arriving at the truth. Suppose that, being possessed of, he had resorted to, other means of proof, by which he had indubitably shown that they had broken their contract, and that in consequence thereof he had suffered damage in the sum of \$1,000, could they have shown as a matter of defense that his boat was weak and un-

fit to be navigated by steam, and that if the machinery had been such as he bargained for, it would therefore have been useless to him? Or that he had never put it to the uses for which it was intended? Or that he had used it in such a careless and improper manner that it had thereby become wholly worthless? We think not. We never before heard of such a defense to such an action. Suppose the purchaser of a horse, paying the full price of a good animal, with warranty of soundness, should, upon discovering that the horse was unsound and not worth one fourth the price paid, permit him through negligence to die upon his hands, could the seller, in an action against him to recover damages for a breach of the warranty, set up as a defense the purchaser's negligence and the subsequent death of the horse? Clearly, he could not. It is needless to pursue this matter further; we think our views must be already understood.

The doctrine of *estoppel in pais* seems equally remote. If it can be applied to any of the acts of the defendants here, by which they were guilty of a breach of their contract, we do not see why it is not equally applicable to every other case of a violated agreement. Equity and good conscience, no doubt, require that every man should faithfully and honestly perform his promises, but his neglect to do so will not shut him out from a full and fair investigation of the facts upon which his alleged non-performance is founded, or deprive him of the benefit of any legal testimony which he may adduce, showing or tending to show that he has fulfilled. Estoppels are sustained because it is against conscience to allow the party to assert to the contrary of what he has before said or done; but is it against conscience to give a party, prosecuted for the non-fulfillment of his engagement, a complete hearing in a court of justice? We are not of that opinion. To say that he is estopped in such a case is to assume the whole matter in controversy against him, to forestall the verdict of the jury, and to deny his right to an impartial trial according to the forms of the law. If the defendants refused to make repairs when by the contract they were obliged to, it is the object of this action to compensate the plaintiff in damages for the injuries which he sustained

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by such refusal, but they are not thereby precluded from showing that no repairs were needed, or that those procured were excessive or unnecessary. If, in setting up the machinery in the boat, a part of her timbers were removed by the defendants, by which she was rendered materially weaker, that too was a damage to be recompensed by this action, but it did not debar the defendants from showing that the vessel was otherwise weak and insufficient, and that by that means the machinery was prevented from working well. Whether it was the originally weak and defective construction of the boat, or the weakness occasioned by the acts of the defendants; or whether it was partly the one and partly the other, if either, which caused the failure of the machinery, were matters for the consideration of the jury, who would determine and assess the damages according to the facts found.

It is contended by the respondent's counsel that the agreement of the defendants to furnish "machinery adapted to and suitable for the boat, and that would drive her from 12 to 15 miles per hour," was an undertaking on their part to provide machinery that would propel her, "as she was," at that speed. In other words, it is said that by this language they warranted her strength and capacity to endure the weight, shocks and friction of her machinery when in motion, and the force and action of winds and waves. It is difficult to frame an argument against a proposition so unreasonable and so unjust. The language does not warrant, nor did the parties contemplate it. The contract was to furnish engines and appurtenances adequate in weight, workmanship and power to run a boat of her size and dimensions at the proposed speed, it being understood that she was sufficiently strong for that purpose, of which the owner, as of course, took the risk. Few mechanics, we apprehend, could be found, who would be willing to undertake the manufacture of machinery "suitable" for boats, if thereby it was understood that they were to be held responsible for the sufficiency of such boats after their machinery was put in.

It appearing from the testimony that the improvements made by the plaintiff were made after the expiration of the

time within which the defendants stipulated for the privilege of making them, and consequently when they were under no legal obligation to do so, the rule of damages should have been the difference in value between the machinery furnished (provided the jury found it to have been defective) and that called for by the contract, adding thereto an allowance to the plaintiff of any expenses he had actually incurred in his business, as a consequence of the failure of the defendants to perform their contract. This last would include the expenses incurred for the board and wages of the captain, engineer and seamen, from the first of August, 1855, when the machinery was to have been delivered, to the time when it was in fact delivered, and the like expenses during the time actually lost by breakages whilst the plaintiff was testing the sufficiency of the machinery, and also during such reasonable time after the boat was laid up as, under the circumstances, was required to supply her with new and suitable engines. To these also may be added interest.

We were at first in doubt whether the plaintiff's claim for board and wages of seamen should not be confined to such time as was lost after the machinery was delivered, and up to and including a reasonable time for supplying other, on the ground of his right, upon the failure of the defendants to furnish it on the 1st of August, to consider the contract at an end and to proceed to supply himself elsewhere; and because his waiver of performance as to time might be considered an abandonment of any claim for damages on that account. But on further consideration we are satisfied this would be wrong. A waiver in such cases is made for the benefit of the party in default, and, as against him, should be construed strictly, and liberally in favor of the party making it. It is supposed to be granted at the request of the party indulged, and should be confined to the precise right waived, (which in this case was the right to refuse the machinery after the day,) and should not be extended to collateral matters. In this case there can be little doubt that the plaintiff was deterred from making exertions to procure other machinery by the conduct and assurances of the de-

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It is almost needless for us to say, further, that the authorities cited by the respondent's counsel, 18 Vermont, 620, and 21 Wend., 342, do not establish, as a measure of damages in cases like this, the sum expended by the purchaser in making repairs, or furnishing other machinery, unless it be so expressly agreed. In the absence of such special agreement, the parties do not contemplate it. In those cases, where the defects, which were unimportant, extending only to a single article or small portion of the machinery and not to the whole subject of the contract, had been supplied by the purchasers on fair terms, evidence of what they had expended was admitted as a proper means of estimating the sum to be deducted, or the true amount of damages as measured by the ordinary rule.

It follows from the views that we have taken, that the judgment must be reversed, and a new trial awarded.

STATE ex rel. TESCH vs. VON BAUMBACH

12 310
115 614
115 615

The legislature has power to prescribe the qualifications of city, town or village officers.

A provision in the charter of a city, that "if any member of the common council shall, while a member, be elected to any other office of said city, such election shall be void," is not unconstitutional.

This was an action of *quo warranto*, brought in this court by the attorney general, in the name of the state, on the relation of *Tesch*, to determine by what warrant the defendant held the office of treasurer of the city of Milwaukee, and to determine also the title of the relator to the same office. The answer admits that at an election held in the city of Milwaukee on the 3d day of April, 1860, for the election, among other officers, of a treasurer of said city for the year ensuing the second Tuesday of that month, the relator received a majority of all the votes cast for any person for that office,

but denies his title to the office upon the grounds, that at the time of the election he was a member of the common council of said city, and was therefore, by law, ineligible to the office of city treasurer, and that, if eligible, he had failed to file his bond as required by law. The answer also alleged that at an election held in said city of Milwaukee on the 5th day of April, 1859, the defendant was duly elected treasurer of said city, to hold said office from the first Monday of June, 1859, until the second Tuesday of April, 1860, and until his successor should be duly elected and qualified, and therefore lawfully continued to hold said office and discharge the duties thereof. Demurrer to the answer.

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Butler, Buttrick & Cottrell, for relator.

It is conceded that *Tesch* was a member of the common council when elected to the office of treasurer, unless his consent to accept an office which was incompatible with that which he already held was, by implication, a resignation of the latter. *The People vs. Carrique*, 2 Hill, 93. It was contended, however, that *Tesch* was ineligible under the 61st section of the amendments to the charter of the city of Milwaukee, passed at the session of 1858, which is as follows: "If any member of the common council shall, while a member, be elected to any other office of said city, such election shall be void." The constitutional power of the legislature to establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution does not require, is denied. *Barker vs. The People*, 3 Cow., 703; *State vs. Williams*, 5 Wis., 308. The constitution having declared who are eligible to certain offices, and who, under certain circumstances, shall be ineligible, (Art. 13, § 3; Art. 3; Art. 4, § 12; Art. 5, § 2; Art. 6, § 4; Art. 7, § 10,) we claim as a legal inference, that it was not the design of the constitution to confer upon the legislature the power to determine the eligibility of any person to offices of trust and profit.

H. L. Palmer, for defendant:

Corporations for municipal purposes may be created by general law. Constitution, Art. 11, § 1. The legislature is authorized to provide for the organization of cities and vil-

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lages, &c. Art. 11, § 3. Their officers are to be elected or appointed as prescribed by the legislature. Art. 13, § 9. Municipal corporations are the mere creatures of the legislative power, and may be organized upon such conditions as the legislature may deem expedient to prescribe. The legislature may define their limits; may limit and define their powers; and may impose such conditions upon the grant of powers as it may think proper. It may prescribe the qualifications of voters, the term of office, and the qualifications for office. *Robertson vs. Rockford*, 21 Ill., 451-458.

The court will not declare a law void as being in conflict with the constitution unless it is *clearly* so. *Sears vs. Cottrell*, 5 Mich., 251, 254, 258. Counsel also cited *State vs. Wilmington*, 3 Harrington, (Del.) 294; Grant on Corp., 13, (80 Law Lib., 25;) Wilcock on Corp., p. 195, §§ 492, 497, p. 26, § 13, (12 Law Lib., 108, 14.)

July 17.

By the Court, DIXON, C. J. Conceding the correctness of the principles laid down by the court in *Barker vs. The People*, 3 Cow., 686, still, we think the defendant is entitled to judgment on the demurrer. The discussion in that case was directed to the power of the legislature to establish arbitrary tests and qualifications for offices *created by the constitution*, which the constitution did not require, and which were repugnant to its provisions; and neither the arguments nor the opinion went beyond that question. As to all such offices and public trusts, to which the people, in the exercise of their paramount authority, have impliedly declared who shall be eligible, either by prescribing special circumstances which shall disqualify, or by reserving to themselves or to the appointing authorities a certain freedom of choice, there are very obvious reasons for holding that eligibility is in the nature of a constitutional right, and that the legislature possesses no power of exclusion not given by the constitution; but it is manifest that those reasons cannot be applied to a mere statutory office which the legislature may create and abolish at will, and concerning which the constitution contains no express provisions. The office in question is of the latter kind, and it is incumbent on those who would main-

tain that the legislature is forbidden, either expressly or by implication, from enacting that a member of the common council shall be ineligible, or that his election shall be void, to point out the specific provisions of the constitution containing the prohibition. Those to which we are referred were clearly intended to have a different application, and are satisfied when their operation is confined to the immediate purposes for which they were introduced. They were never designed to limit or control the action of the legislature in respect to those matters which were considered too unimportant to be made the subjects of constitutional regulation; and it would be a plain violation of the spirit and purposes of the constitution so to apply them. Matters thus omitted are subjected to the discretion of the legislature which represents the sovereign power of the state and can make such rules as it deems wholesome and proper for the maintenance of good government. The constitution does not prescribe the qualifications of city, town or village officers, nor declare who shall or shall not be eligible, and hence it is within the power of the legislature to provide for them. It merely directs how such officers shall be elected or appointed. Sec. 9, Art. XIII. There is therefore no constitutional objection to the statute under consideration, and the election of the relator was void.

Judgment for the defendant.

BENEDICT VS. THE STATE.

The caption of an indictment was as follows: "At a term of the circuit court for the county of Portage in the State of Wisconsin, begun and held at the court house, in the village of Plover, in the County of Portage aforesaid (stating the time when, and the judge by whom said term was held), the jurors for the grand jury for the state of Wisconsin aforesaid, good and lawful men, duly summoned, empannelled, tried and sworn, inquiring in and for the body of the county of Portage aforesaid, on their oaths aforesaid, do present:" *Held*, that it was sufficient.

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12	313
74	451
12	313
80	410

12	313
115	55

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Where a defendant in a criminal action has any exception to take to the proceedings on his trial in the circuit court, arising out of any matter which does not regularly appear in the record, he should make and file his bill of exceptions, which, being allowed by the judge, becomes a part of the record, or, if it be a proper case for a report to this court, under the statute, should see that such exceptions are embodied therein; otherwise this court cannot judicially know that such matters of exception exist.

Every judgment or sentence of imprisonment in the state prison, must direct that the convict be punished by confinement at hard labor, and also by solitary imprisonment (for such term as the court shall direct, not exceeding twenty days at one time); and if the sentence is silent as to such hard labor or such solitary imprisonment, it is erroneous.

A statement in the record that the court gave the prisoner the following sentence, "That you now be remanded back to jail, and that the sheriff do convey you to the state prison, and then and there to be confined during your natural life," purports to be merely a memorandum by the clerk of the language addressed by the judge to the defendant, and cannot be received as the record of the judgment of a court in a criminal proceeding.

In such a case, the proper practice is for the appellate court to remit the record to the court below, with a direction that it proceed to give judgment upon the conviction according to law.

ERROR to the Circuit Court for *Portage* County.

Indictment for murder. The caption of the indictment was as follows: "State of Wisconsin, County of Portage, ss. At a term of the circuit court for the county of Portage, in the State of Wisconsin, begun and held at the court house in the village of Plover, in the county of Portage aforesaid, on the second Monday, in the month of May, in the year of our Lord one thousand eight hundred and fifty eight, before the Hon. GEORGE W. CATE, judge of the seventh judicial circuit in the State of Wisconsin, the jurors for the grand jury for the State of Wisconsin aforesaid, good and lawful men, duly summoned, empanelled, tried and sworn, inquiring in and for the body of the county of Portage aforesaid, on their oaths aforesaid do present," &c. Plea, not guilty.

After verdict against the defendant, a motion for a new trial was made and overruled, but no case or bill of exceptions was settled. After a motion in arrest of judgment overruled, the record proceeded as follows: "The prisoner being now brought into court to receive the sentence, the court gave said prisoner the following sentence: 'That you now be remanded back to jail, and that the sheriff do con-

vey you to the state prison, and then and there to be confined during your natural life.'"

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Alban & Parks, for plaintiff in error.

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J. H. Howe, Attorney General, for the state.

July 18.

By the Court, DIXON, C. J. The objection taken by the counsel for the plaintiff in error to the caption, or formal statement, describing the court before which, and the grand jurors by whom, the indictment in this case was found, are clearly untenable. The caption is in the usual form, and contains as full and accurate recitals of the preliminary steps or proceedings up to, and including the time the plaintiff was actually charged with the offense, as are commonly found in such instruments. It sufficiently appears before what court the prisoner was charged, and that the indictment was presented by a jury of good and lawful men, who were duly summoned, empannelled, tried and sworn. The authorities cited only go to the extent of showing that indictments defective in these particulars, or by which it appears that the preliminary proceedings were irregular, and not in compliance with law, will be considered bad, and that courts will indulge in no presumptions against the statements of the record. No exceptions having been taken and settled, the other objections, save those to the form and substance of the judgment, cannot be noticed. If a party has any exception to take to the proceedings in his trial, arising out of any matter which does not regularly appear in the record, he should make and file his bill of exceptions, which, being allowed by the judge, becomes a part of the record, of which he may avail himself upon a writ of error; or in a proper case, he should see that such exceptions are embodied in a proper report, to be made to this court pursuant to the provisions of the statute. Otherwise, it is impossible for a court for the correction of errors, to judicially know that such matters of exception exist.

So far as the objections to the supposed judgment are concerned, it is perfectly clear that they are well taken. The sentence differs so widely from that prescribed by the statute, that there is no room for doubt or comment. The 5th

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sec. of chap. 150 of the Statutes of 1849 (identical with sec. 5 of chap. 181 of the Statutes of 1858), provided that, "In every case in which the punishment of imprisonment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such punishment, the solitary imprisonment shall precede the punishment by hard labor, unless the court shall otherwise order." The effect of this provision is very obvious. It makes hard labor and solitary confinement constituent and indispensable elements or parts of every judgment where by law the crime or offense is punishable by imprisonment in the state prison. Without them there is no such sentence as the law authorizes or requires. This point was directly decided by this court in the case of *Fitzgerald vs. The State*, 4 Wis., 395; and it was there held, also, that it made no difference that the sentence pronounced was milder than that prescribed by law. The supposed judgment in this case, in addition to being entirely silent upon both the hard labor and solitary imprisonment, is not in the form of a judgment, and does not purport to be the sentence or adjudication of the court upon the verdict found by the jury. The court does not order or adjudge that the convict be imprisoned in the state prison for and during the period of his natural life, &c., but the record purports to be merely a memorandum by the clerk of the language of the presiding judge, addressed to the accused, and is in these words: "That you now be remanded back to jail, and that the sheriff do convey you to the state prison, and then and there to be confined during your natural life." Such a loose memorandum as this can never be received as the record of the formal and solemn judgment of a court in a criminal proceeding. It would not be sufficient in a civil action. For these reasons, upon which it seems useless to enlarge, we are of opinion that the sentence or judgment, which the law declares shall be pronounced upon the plaintiff in error, for the crime of which he stands regularly convicted, according to the laws of the state, has not yet been

pronounced; and since it is doubtful whether this court has the power to supply the deficiency, the proper course appears to be for us to order the court below to proceed to give judgment on the conviction. In thus disposing of this case, we have adopted the practice of the court of King's Bench in England, where under like circumstances a *procedendo* is awarded. See *King vs. Kenworthy*, 1 Barn. & Cress, 711 (8 E. C. L., 196), and *Regina vs. Holloway*, 5 E. L. & E., 310. This course appears to us to be not only rational and correct, but the only one which, in many cases, will save the justice of the state in criminal proceedings from being entirely defeated, through the mistakes or oversights of clerks and other officers, in matters not reaching or at all affecting the merits of the controversy or the legal rights of the accused. It is, also, in keeping with the spirit of the act of April 2d, 1860 (chapter 364, Laws of 1860), by which it is provided that in case this court shall reverse any judgment in a criminal case, upon writ of error thereafter brought, for any defect, illegality or irregularity in the proceedings subsequent to the rendition of the verdict of the jury therein, it shall be competent for this court to pronounce the proper judgment, or remit the record to the court below, in order that it may be there pronounced.

The case must, therefore, be remitted to the court below, with directions that that court proceed to pronounce the judgment required by law. The plaintiff in error being now confined in the state prison, without legal authority, ought to be surrendered to the sheriff of the proper county, in whose custody he will remain until the proper sentence can be pronounced.

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115	61

▲ common law *certiorari* is not the proper proceeding to correct the errors of inferior tribunals in executing the powers delegated to them. Its object is to confine such tribunals within their jurisdiction, and prevent them from exercising powers not delegated.

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ERROR to the Circuit Court for *Fond du Lac* County.

The plaintiffs in error sued out a common law *certiorari* from the Fond du Lac circuit court, to bring before that court the transcript of a judgment rendered against them in favor of *Potter*, before a justice of the peace. The application for the writ was based upon an affidavit stating that on the day of the trial of the action between the parties before the justice, at half-past two o'clock in the afternoon, and while the justice was hearing or deliberating upon said cause, an attorney for the defendants appeared before the justice, and asked for leave to file the general issue, and asked for an adjournment, both of which the justice refused, although the plaintiff and his attorney were then present, but rendered judgment. The transcript returned by the justice, after stating the title of the cause, &c., was as follows: "January 16th, 1855, at 2 o'clock, p.m., suit called—plaintiff appeared and answered—defendants then called, did not appear. Plaintiff declared upon an instrument signed by said defendants, and claimed damages, one hundred dollars, and the case was submitted, after which an attorney, at half-past two, p.m., appeared for defendants, and was allowed, by consent of plaintiff's counsel, to produce any proofs or defense he may have, which he declined, but asked the privilege of filing the plea of the general issue and asked for an adjournment, which was denied by the court as being too late. Whereupon the court, being satisfied that the plaintiff is entitled to judgment for the sum of \$100, judgment is hereby rendered for that sum," &c. The circuit court affirmed the judgment of the justice.

R. P. Eaton, for plaintiffs in error, contended that the justice erred in refusing the plea offered, thus depriving the defendants in the action of the right of appeal, and cited *R. S.*, chap. 88, sec. 226, 12 *Wend.*, 150.

E. S. Bragg, for defendant in error.

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By the Court, PAINE, J. We think the court below properly affirmed the judgment of the justice of the peace. The only ground of objection relied on was that the justice refused to receive the defendants' plea, after the case had been sub-

mitted on the part of the plaintiff. Whether this was erroneous or not, it was not such an error as can be reached by a common law *certiorari*. The object of that writ is to confine inferior tribunals within their jurisdiction—to prevent them from exercising powers not delegated to them, and not to correct every error they may commit in executing the powers that are delegated. We held in *Stokes vs. Knarr and another*, at the last term, that this writ was not confined to cases where there was an entire want of jurisdiction, but that it might reach an excess of jurisdiction, and correct a judgment, on the face of which it appeared that the justice had assumed powers beyond those conferred by law. But that is not this case. The justice here assumed no such powers, and there was no error appearing which could be reached by a common law *certiorari*.

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Indeed, it may well be doubted whether any error at all was committed. The case of *Pickert vs. Dexter*, 12 Wend., 150, relied on by the plaintiff in error, certainly does not show it. It only holds that the justice should allow the defendant to plead if he appears and offers to do so before the plaintiff has closed his proofs. But here the record shows that the case was submitted on the part of the plaintiff before the defendants appeared. But this point it is unnecessary to determine. For the reasons before stated, the judgment is affirmed with costs.

GILLET and others vs. ROBBINS.

A statement in a bill of revivor that the complainants therein are the heirs at law of the complainant in the original bill, who has died intestate, is a sufficient allegation of heirship, without a more minute statement of the facts which show them to be such heirs.

Amendments to pleadings rest upon the sound discretion of the court before which the case is tried, and will not be reviewed on error or appeal, except in cases where the discretion has been manifestly abused.

Where averments, however defective, are sufficient to inform the opposite party fully of the facts intended to be proved, an amendment to such averments

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allowed at the trial for the purpose of remedying their defects, will not constitute such a surprise upon the opposite party as will entitle him to a continuance of the cause, even though he may have relied upon such defects to obtain a judgment.

A statement upon oath of the defendant, in his answer to a bill in equity, may be overcome by the testimony of two or more witnesses, to admissions of the defendant inconsistent with such statement.

APPEAL from the Circuit Court for *Green County*.

Benoni R. Gillett filed his bill in equity in March, 1848, in the district court of Wisconsin Territory for the county of La Fayette, to compel the defendant, *Robbins*, to convey to him the N. E. qr. of the N. W. qr. of sec. 32, town 1 N., R. 1 E., in that county, which the bill alleges the defendant purchased at the public land sale in 1847, at the U. S. Land Office at Mineral Point, at \$1.25 an acre, and paid for with money furnished him for that purpose by the plaintiff, under an agreement that the defendant would purchase at said sale in his own name the east half of said qr. section, and convey the N. E. qr. of said qr. to the plaintiff in a reasonable time thereafter, or upon request. The bill alleges a request for a conveyance, and the defendant's refusal to convey.

In September, 1851, a bill of revivor was filed by Almon Gillett, Philo Gillett, Lester F. Gillett, Henry M. Gillett, Leonard F. Gillett, Elijah R. Gillett, Orlin H. Gillett, William W. Gillett, Charles Gillett, Apollos Griffin, Parmelia Griffin, Norton Case and Jennet Case, alleging that said *Benoni R. Gillett* died intestate in April, 1848, and that they were his heirs at law. In November, 1851, the defendant filed his answer under oath, in which he admitted the decease of *Benoni R. Gillett*, but denied any knowledge or information as to whether he died intestate, or as to whether the complainants in said bill of revivor were his heirs at law, and as to the matters stated in the original bill, denied that he purchased the land in controversy in trust for said *Benoni R. Gillett*, or ever held the same, or any part thereof, in trust for him, but avers that he purchased the same at said land sale in his own name, and paid for the same with his own money. He denied that he ever made any contract relative to the purchase of said land with said *Benoni R. Gillett* alone, but averred that, previous to the sale, he entered into a parol

contract with said *Gillett* and one Edwards, that they, or one of them, should furnish him before said land sale, with the money necessary to purchase said piece of land, and that with such money he would purchase said land in his own name, and afterwards convey such parts thereof to the said *Gillett* and Edwards respectively, as should, within ten days after the close of said land sale, be awarded to each of them by the arbitrament of certain persons named, who were then denominated a town board of arbitrators, &c. He denied that either said *Gillett* or Edwards furnished him any money for the purchase of said land prior to said land sale, but admitted that after he had purchased said land and paid for it with his own money and received the duplicate therefor, and upon the evening after he had received said duplicate, said *Gillett* handed to him the sum of \$50, which he received, that being the price which he had paid for the land in controversy. The answer further states that, although under no legal obligation to do so, yet he would have conveyed said land to said *Gillett* and Edwards, but for the fact that their respective claims were never settled by said arbitrators or otherwise, and that said *Gillett* directed him not to make a deed to said Edwards for any part of said land, and Edwards directed him not to make a deed to said *Gillett* for any part thereof, and he was threatened with litigation, by each, if he made a deed of any part to the other. He admits that said *Gillett* demanded of him a deed for the whole of said land, which he refused to make, and avers that he offered to refund to said *Gillett* the said sum of \$50, which *Gillett* refused to accept, and that he is still ready and willing to refund it to the person entitled to it. The answer also insisted upon the statute of frauds as a bar to the relief prayed for.

In October, 1855, a supplemental bill was filed by *Philo, William W. and Leonard F. Gillett*, in which they state that all the other complainants in the bill of revivor had conveyed to them their interest in the land in controversy. The defendant filed an answer to the supplemental bill, denying any knowledge or information as to the matters therein stated. There was a replication to the answer of the defendant to the original bill and the bill of revivor. The venue

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was changed to Green county, and on the trial, deeds executed to *Philo, William W. and Leonard F. Gillett*, by their co-complainants in the bill of revivor, purporting to convey their interest in the land in controversy, were offered in evidence, and objected to by the defendant, for the reason that by said bill the grantors appeared as parties to the record, and that conveyances afterwards made to their co-plaintiffs were not evidence in the cause, even if any title was conveyed thereby. The objection was overruled, the defendant excepting, and the deeds read in evidence. The complainants also offered in evidence a deed executed by said Edwards in February, 1856, conveying his interest in the land in controversy to *Philo Gillett*, which was objected to by the defendant as irrelevant, and because it was executed after the filing of the bills in the cause. The objection was overruled, the defendant excepting, and the deed read in evidence. The complainants then offered to read certain testimony of Orlin H. and Henry M. Gillett, and Charles Harris, taken in the case in open court, at the March term, 1857, and reduced to writing by the judge of the court, to which the defendant objected, for the reasons that said Orlin H. and Henry M. were incompetent to testify on the ground of interest, being parties to the record as plaintiffs, and that their conveyance to their co-plaintiffs after the filing of the bill of revivor, did not render their testimony admissible, and because the plaintiffs had taken the deposition of said Harris in the case, which was then on file in the court, and because the testimony contained in the deposition was different from that proposed to be read in evidence. The objections were overruled, the defendant excepting, and the proposed evidence was read.

Orlin H. and Henry M. Gillett, testified that *Benoni R. Gillett* was never married; that he had no father or mother living at the time of his death; that the *Gilletts* named as plaintiffs in the bill of revivor were his brothers, and *Parmelia Griffin* and *Jennet Case*, his sisters; and were his sole heirs at law. Orlin H. testified further as follows: "*Benoni R. Gillett* was in possession of [the land in controversy] before and at the time it came into market; that is, he had a mineral lot on it, and collected rents from it before and after

the sale, and I know of no one who pretended to have any claim to it until the time of the sale, when John Edwards set up a claim to the half of ten acres of it." "I was present at the land sale at Mineral Point, when this land came into market in the spring of 1847. My brother *Benoni* was also there at the sale. I understood from *Benoni*, and from the defendant, that each was to furnish the money to enter a forty, and defendant was to enter the whole eighty in his own name, and then deed over the forty in question to *Benoni*. This agreement was talked over and assented to by both, before and after the sale." "The entry of the land in question was made in the defendant's name. The morning after the sale I met defendant in the streets of Mineral Point, before the sale commenced for that day, and he asked me where *Benoni* was. He said that he had not yet paid him the money to get the duplicate of the land, and asked me to look him up. I went to find him. I did not find him, and on my return met defendant again, and he told me that he had seen *Benoni*, and got the money from him, and had got the duplicate. My brother *Benoni* continued to collect the mineral rent from this land up to the time of his death, and I, as his administrator, collected some after his death. The reason why the land was bid off by defendant, was, that if sold in eighty acre lots, it sold at \$1,25 per acre; but if sold in forty acre tracts, it sold at \$2,50 per acre, as the minimum price. My brother informed me at the sale, that Edwards set up a claim to a part of the forty, but he did not say that there was any agreement by which Edwards was to have any portion of it."

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Henry M. Gillett testified as follows: "After the land sale at Mineral Point was over, defendant, on his way home, came to my house, and I had a conversation with him about the sale. He said my brother *Benoni* furnished the money to enter one-half of the eighty, and he entered the whole in his own name, and was to give my brother a deed for the north forty, at any time he called on him for it."

Charles Harris testified as follows: "*B. R. Gillett* occupied the north forty of the east half of the quarter section [in controversy] at the time of the land sale. The day the defend-

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ant returned from the land sale, or the day after, I asked him if *Gillett* entered the north forty. He said no; he entered the whole eighty in his own name, but that *Gillett* furnished the money to pay for the north forty, and he was to deed it to him. He said the reason for making this arrangement was, that if the whole eighty was entered together, the minimum price was \$1,25, but if entered in forty acre lots, it would have been \$2,50 per acre. He said he had some trouble in hunting up *Gillett*, to get the money of him to pay for the land, but that he finally found him, and mentioned his having the money in an old handkerchief, and said he had not money enough of his own to pay for the land; that he had only money enough to pay for his own forty and his expenses."

The only evidence offered on the part of the defendant, was the deposition of said Edwards, who testified substantially as follows: "I claimed, up to the time of the land sale at Mineral Point, twenty acres of the forty in question, but at the sale I relinquished to *B. R. Gillett* my claim to ten of said twenty acres, and then claimed the N.W. qr. of said forty. I and *B. R. Gillett* appointed the defendant to enter said land for us at the land sale at Mineral Point, in 1847, conditioned that he should deed to me and *B. R. Gillett* our respective shares of the land, as claimed by us previous to the sale. After the sale I tendered to *B. R. Gillett* my portion of the money for the land, and he said, 'You need not pay; I owe you money, and you will give me credit for the amount in account.' The defendant never refused to deed the land to me, but has withheld the deed, saying that *B. R. Gillett* told him not to deed to me. Not quite two years ago I gave to *Philo Gillett* a deed for my part of said land, for \$50."

Upon the argument of the case, the counsel for the defendant insisted that the plaintiffs were not entitled to a decree, for the reason that they claimed as heirs at law of *Benoni R. Gillett*, who filed the original bill in this cause, and that the facts showing that they were such heirs, were not set forth in the bill of revivor or any subsequent pleading of the plaintiffs. After the cause was submitted to the

court on the part of the defendant, for final decision, the complainants asked leave to amend their pleadings by setting forth therein "the facts necessary to show that they were the heirs at law of said *Benoni R. Gillett*." The defendant's counsel objected to such amendment, for the reason that it would be unjust to the defendant to make a case by amendment after the cause was entirely submitted on his part, and that he was not prepared to make defense to such amendment. The court overruled the objection, and allowed the amendment, the defendant excepting. The defendant's counsel then asked a continuance of the cause until the next term of the court, and in support of the motion and of his objection to the amendment, made and filed an affidavit, the substance of which was, that the defendant himself was not, to the knowledge of counsel, in the county of Rock; that the counsel supposed him to be more than eighty miles distant from the place where the hearing was then going on; that the case made by the amendment with the other statements in the bill, was such, that he, the counsel, was not prepared to try or dispose of the cause at that time; that the amendment supplied a material defect in the complainants' pleadings, upon which we had relied with confidence to obtain a decree in favor of the defendant, up to the time when he finally submitted said cause to the decision of the court.

The court refused to continue said cause, or impose any terms upon the complainants in allowing said amendment to be made, to which ruling of the court the defendant excepted. The court found as facts that *Benoni R. Gillett*, at the land sale at Mineral Point, in the spring of 1847, furnished to the defendant \$50, with which the defendant agreed to enter the land in controversy, and after such entry to convey it to said *Gillett* on request; that with said money the defendant purchased said land in his own name; that after such entry said *Gillett* demanded of the defendant a conveyance of said land, which he refused to execute; that said *Gillett* died intestate in April, 1848; and that the complainants in the supplemental bill, as heirs of said *Benoni R. Gillett*, deceased, and by purchase from their co-heirs, are now the equitable owners of said forty acres of land, in certain

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proportions designated in said finding. The court therefore ordered judgment against the defendant that he convey to the said complainants their respective interests in said land, and that the complainants recover costs, &c.; to which finding and decision the defendant duly excepted, and judgment being entered in accordance with such finding, the defendant appealed.

James H. Knowlton, for appellant :

1. The court erred in allowing the plaintiffs to amend their bill, so as to state a case for the heirs, after the cause was submitted by the counsel for the defendant. 2. The case made by the bill is an express trust, created by parol. The defendant in his answer expressly denies the trust and insists on the statute of frauds. A parol express trust cannot be enforced when the defendant insists upon that statute. Nor can a parol contract for the conveyance of lands be enforced, when there has been no part performance. Payment of all the purchase money is not part performance which will take the case out of the statute. Going into possession of the land under and in pursuance of the contract is part performance, and takes the case out of the statute. Nothing of this kind was done in this case. *Dyer vs. Dyer*, 1 Eq. Lead. Cases, 144, 145, note; *Bartlett vs. Pickersgill*, 1 Eden, 515, *et seq.*; *Bellasis vs. Compton*, 2 Vt., 294; *Botsford vs. Burr*, 2 Johns. Ch. Rep., 411 to 414; 10 Ves., 517; *Jackman vs. Ringland*, 4 Watts & Serg., 149. 3. A resulting trust may be established against the answer of the grantee, by parol evidence when it is full, clear and satisfactory. 1 Eq. Lead. Cases, 201, 202, and cases there cited. But the testimony of two witnesses, that they heard the defendant say that *Benoni R. Gillett* let him have the money to buy the land, is not full, clear and satisfactory, and sufficient to overcome his positive denial made by his answer on oath, which fully explains the facts and is corroborated by the testimony of Edwards. Much more satisfactory evidence has been ruled to be insufficient, where witnesses swore to facts and not mere admissions. See 2 Johns. Ch. R., and 10 Vesey, *ubi supra*. 4. The claims of *Gillett* and Edwards were to be determined by arbitrators. They claimed distinct parts of the land in

controversy, and their claims not having been determined up to the time when this suit was commenced, *Robbins* could not in good faith, and with safety to himself, have conveyed to either of them. The conveyance by Edwards to *Philo Gillett* since the suit was commenced, cannot be allowed to affect the defendant in this action. 5. If the court were right in giving judgment that the defendant should convey the land, it was error to mulct him in costs.

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J. A. Sleeper, for respondents :

The amendment allowed at the trial had the effect to introduce into the pleadings a statement of the evidence which would prove that the complainants were the sole heirs at law of *Benoni R. Gillett*. That they were such heirs was a fact to be proved; the pleadings of the complainants contained allegations of the fact; the answer of the defendant required that proof to establish that fact should be made. There was therefore no defect in the pleadings on which the counsel had any right to rely; nor could the amendment by any possibility injure the defendant, or affect his rights. The whole matter was within the discretion of the court. 2. *Benoni R. Gillett* being in possession of the land as a claimant, and having furnished the money for its purchase according to the agreement alleged in the bill, the purchase of the land with that money raised a resulting trust in favor of *Gillett*. The mere act of providing the money with which the land was bought, without any agreement, would raise such a trust. *Lead. Cases in Equity, Dyer vs. Dyer*, p. 139, and notes; Statutes of 1839, p. 162, § 6. 3. The denial in the answer that the defendant purchased the land for *Benoni R. Gillett*, is clearly overcome by the testimony of two witnesses, or what is equivalent thereto. 4. The answer admits enough of the plaintiffs' case to entitle them to their decree. It admits that *Gillett* immediately after the sale, reimbursed to *Robbins* the \$50 said to have been advanced by him for the land, and this, under the arrangement existing between the parties, was equivalent to a payment of that sum to *Robbins* in advance of the sale.

By the Court, DIXON, C. J. The pleadings in this case were

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made up anterior to the adoption of the Code and according to the system which formerly prevailed in the courts of chancery. The counsel for the appellant referred us to no adjudications in which it has been held that it was bad or insufficient pleading, in a bill or answer in equity, to allege that certain named parties were heirs at law of a deceased person, and that as such upon his death they succeeded to certain of his rights. Upon examination we can find no authorities sustaining such a position. On the other hand, we find in several books or collections of precedents, of well established authority and reputation, each of which may be regarded as having received the sanction and approval of competent tribunals, that, both at common law and in equity, this form of averment was frequently used. Curtis's Eq. Pl., 74, 87; 2 Bar. Ch'y. Pr., 559, 566; 2 Chitty's Pl., 468, 469. The two things taken together would seem to establish as matter of authority, that the allegation in the bill of revivor, before the same was amended, that *the complainants therein were the heirs at law of Benoni R. Gillett deceased, intestate, to whom the real estate, described in the original bill filed by him, descended by the laws of descent, was sufficient, and that consequently no amendment was necessary.*

On general principles we do not see why such statement ought not then to have been, and would not now be considered as a good averment of matter of fact which it was material for the complainants to allege and prove, in order to maintain the action. Although it may in strictness be said that, whether one person is, or is not, the heir at law of another who is dead, is a mixed question of law and of fact; and that the averment that he is so, is in part a conclusion of law, to be deduced from several intermediate facts which must be established in evidence; still it is so much in the nature of a fact, and its statement in this form so fully apprises the opposite party of the foundation of the claim, which is set up against him, that the law, which favors brevity and conciseness, and the avoidance of unnecessary allegations, in pleading, treats it as such. Many analogous instances of mixed matters of law and fact being, for the purpose of pleading, treated as facts, might be cited. Such, in

particular, are statements of title or ownership of property, both real and personal. The averment that a party is the owner of an article of personal property, in relation to which he claims some right or some redress in a court of law or equity, will, we think, when subjected to a rigid analysis, be found to be quite as much, if not more, a conclusion of law, than a statement of fact; yet our daily experience and constant practice prove, that such averments are, and ever have been considered good. The same is true of the title or seisin of real property, the proof of which often depends upon a long succession of conveyances, each of which must, on the trial, be established by competent testimony, but none of which has it ever been the custom to set out in the pleadings. It is difficult to perceive any reason which would require parties claiming to be the heirs of a deceased person, to state the several degrees of their relationship to the deceased, with all the accompanying circumstances, which would not equally require one asserting title to realty to set out the several links in the chain, by virtue of which he proposes to connect himself with the original source of the title. In either case, it is a technical nicety, which the law, looking more to the correct and easy administration of justice than to absolute logical harmony, does not demand. Both, when plainly and directly stated, though partaking somewhat of the nature of legal conclusions, are deemed sufficient to inform the opposite party of the foundation of the claim made against him, which is the principal object of all pleadings. Any other rule in such cases would lead to a needless particularity and burdensome prolixity of statement, often times very difficult to be attained. Hence, we are of opinion that no amendment of the bill in this case was required.

But if it be admitted that the bill was, in this respect, defective, and the amendment necessary, we do not, then, see how the defendant or his counsel can claim to have been taken by surprise by it. They must have known that the plaintiffs would come to the trial relying upon, and expecting to prove the fact, that they and the other complainants in the bill of revivor, under whom they claimed, were the heirs at

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law of the deceased. This was a matter lying so plainly and palpably at the foundation of the action, that its consideration could not have been overlooked by either of the parties. The entire rights of the plaintiffs depended upon it; and unless it was proved, no judgment in their favor could be obtained. The defendant and his counsel must also have known that the plaintiffs intended to offer this proof under the averments contained in the supplemental bill and the bill of revivor. Those averments, however defective, were certainly sufficient to inform them of that intention. Proofs to that end were taken some months before the trial took place. Under these circumstances there is no room for the supposition that the testimony introduced came unexpectedly upon them, or that they were not fully aware that it would be offered and relied upon. Indeed, the counsel, in his affidavit of surprise, does not pretend that he was taken unawares by the evidence, but he says, that up to, and including the trial, and when the cause was submitted, he relied upon the supposed defects for the purpose of defeating the action, and obtaining a decree in favor of the defendant. It is nothing more nor less than saying, that the action of the court in allowing the amendment, was unexpected to him—that he did not anticipate it. This, in our opinion, is not the kind of surprise or misleading contemplated by the statute. We understand it to refer to the sudden and unexpected proof of *facts*, of which the opposite party cannot, by the pleadings, be reasonably said to have had notice; and which, for that reason, he could not, in the exercise of ordinary diligence, have been prepared to meet or rebut. The spirit, if not the letter, of our statutory provision concerning the amendment of pleadings, both as to defective statements of facts and variances between the allegations and proofs, binds the parties to the exercise of good faith in all their transactions in relation to them. If they are defective or irregular, or differ from the facts proved, the parties are bound to know that the court possesses the power of amendment, and that in furtherance of justice, this power will be exercised on the most generous and liberal terms, in all cases where there is enough of substance in the defective

pleading to have fairly apprised the opposite party of what he was required to meet. They are bound to take notice that in all cases, amendments will be granted on fair and reasonable conditions. They rest in the sound discretion of the court, and will not be reviewed on error or appeal, except in cases where the power has been clearly and manifestly abused. The judge at the circuit can best determine whether the adverse party has been surprised or misled, or whether any injury is likely to result to him from his relying on the defect or variance; and whether he ought, in good faith, to have relied upon it all. In this case we are satisfied, conceding the amendment to have been necessary, that it was no abuse of discretion, to allow the complainants to amend instantaneously, and on the argument, without costs, and without a continuance of the cause.

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We have taken this occasion briefly to express our views on this subject, not because we are of opinion that any step taken in the cause is attributable to bad faith on the part of either of the counsel or parties to it, but because of its importance to the profession, growing out of the frequency of applications of this nature, and because it seemed to us not unsuited to the purpose. The question here involved arose at a very early day after the adoption of the Code of Procedure, and at a time when there had been no adjudications upon its provisions; and when either good or bad faith in relation to it could hardly be ascribed to any body.

Upon the merits of this action we feel very confident that the judgment of the circuit court was correct, and that it ought to be affirmed. The question upon which the determination of its merits mainly, and we might almost say entirely, turns, is whether the evidence discloses a parol express trust in reference to the land, or a resulting trust. If the former, although the purchase money was fully paid, yet there being no other act done, a conveyance would not be decreed. If the latter, according to the laws which prevailed in the territory of Wisconsin, at the time the transaction took place, a specific performance should be ordered, although according to the provisions of our present statutes, sections 6, 7, 8 and 9, of chapter 84, such trust

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might not be declared or performance ordered in behalf of the present plaintiffs, if the affair had transpired since their enactment. In determining whether it was a parol express trust, or is one resulting by implication of law, it is only necessary to ascertain whether the purchase money was furnished by the deceased to the defendant before he completed the purchase at the land sales, and was applied by him in payment for the land, as is charged in the bill; or whether he received it after he had, in fact, made the purchase with his own money, and in pursuance of the previous parol agreement, by which he was to buy and convey to the deceased, as is insisted in the answer. This will readily be recognized as purely a question of fact to be decided upon the evidence produced. That the defendant bought the land, not for himself, but upon a trust resulting or parol, is not disputed. Nor is it denied that he, at or about the time of the sale received from the deceased, the full amount of the consideration paid. These facts are admitted in his answer. But he insists that the parol contract into which he entered, was with the deceased and one John Edwards, to whom he was to convey the land, according to the terms and conditions of the contract, as set forth by him in his answer. He denies that the contract was made with the deceased alone. He also denies that he received the consideration money from the deceased before the purchase was consummated, but admits that he received it on the evening of the same day on which he obtained the duplicate, and paid for the land with his own money. The bill charges that the agreement was made solely with the deceased, and that the land was paid for with money previously furnished by him to the defendant for that purpose. These are the material points of the issue.

It cannot be denied, that in considering questions like the present, where one party admits facts which tend strongly to show that the other is morally and equitably entitled to the relief which he asks, but insists upon some statute, as in this instance upon that against frauds and perjuries, to tie up the hands of the court, and prevent its being granted, it is often very difficult to rid our minds of the impressions which such

admissions are calculated to create. We involuntarily cling to what appears to be the substantial equity of the transaction. But aside from any influence of this kind, against which we have endeavored to guard, and giving to the answer the credit to which it is entitled as evidence in the defendant's behalf, we are clearly of opinion that there is a decided preponderance of proof in favor of the allegations of the bill. The objections to the testimony which is relied upon to overcome the denials of the answer, go to its character rather than to the number or credibility of the witnesses sworn. It consists in admissions made by the defendant at or about the time of the sale, to the effect, that he had purchased the land for the deceased, and with funds provided by him; and in proofs that the defendant had acquiesced in the occupancy and receipt of the rents of the land, by the deceased and those claiming under him, since the time of the sale, the same being a valuable mineral lot. It is insisted that such admissions ought not to be received for the purpose of disproving or rebutting the sworn statements of the answer—that in order to destroy its effect, the witnesses must testify to facts within their knowledge, and not to what they have heard the defendant say in relation to them—and that the positive testimony of three witnesses, to declarations directly contradicting the averments of the answer, and made at different times, and under different circumstances, are not equivalent to the evidence of two witnesses to the facts themselves, and are, therefore, not a compliance with the old chancery rule upon the subject. But two authorities (10 Vesey Jr., 517, and 2 John. Ch. R., 412) are cited to support these positions, neither of which, in our opinion, does so. Both recognize the admissibility of such declarations, but admonish us that they are evidence of an unsatisfactory character, on account of the ease with which they may be fabricated, and the impossibility of contradicting them; and warn us against their being too readily accepted and believed. But with these cautions, we know of no rule which forbids them in any case. We know of no principle of law touching an answer in chancery which renders its statements so sacred or so infallible, that

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GILLETT et al. v. ROBBINS. principle which authorizes the reception of admissions, namely, that whatever a party, contrary to his own interests, voluntarily admits to be true, may reasonably be taken for the truth, seems to be as applicable to such a case as any other. We can see no reason for the exception. And if the admissions are clearly and satisfactorily proved, and are such as to convince the court of their truth, we are unable to see why they may not be acted upon. In this case, when taken in connection with the facts admitted in the answer, and the circumstances of possession and control of the land, they satisfactorily establish the allegations of the bill. The theory upon which it is sought to exclude them, would, if adopted, extend to their exclusion in all cases where, according to the former system, there was an answer under oath, without regard to their character or the manner in which they were made; and it would follow that written admissions, contrary to the averments of the answer, no matter how many times repeated, if not under oath, would be of no avail to the plaintiff. Such, it seems to us, could not have been the law.

The testimony of the witness Edwards, whom the defendant claims to have been one of the parties to the contract, does not shake the case made by the plaintiffs in the least. It is true that he testifies that he claimed a portion of the land in question prior to the land sales, and that he and *Gillett*, the deceased, appointed the defendant to enter it for them. But his testimony on this subject is so very meagre, and couched in such language, that the impression that he and *Gillett*, and the defendant, never talked together at all until long after the sales, is unavoidable. He swears to no bargain or agreement between them. He says that he and *Gillett* "did appoint *Robbins* to enter the land," &c.; from which the only legitimate inference is, that whatever understanding there might have been between him and *Gillett*, it was one to which the defendant was not a party, and which was arrived at when he was not present. His testimony further shows, that by his agreement or understanding he was to look to *Gillett* for whatever title or interest he claimed.

He speaks about having tendered to him his portion of the purchase money. He claims to have advanced no part of it, but admits that it was all paid by *Gillett*. This as to him would make the contract clearly within the statute. He had no rights which could have been enforced.

Judgment affirmed.

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The words "personal service," in section 27, chapter 132, R. S., 1858, mean service by delivery of a copy of the summons and complaint, or of the summons only (as the case may be), to the defendant *personally*. In case of service by copy left at the defendant's place of abode, the plaintiff should apply to the *court* for judgment.

Where a judgment has been entered by the clerk under that section, and a motion made to set aside the judgment, on the ground that there had not been a personal service of the summons, leave should be granted for the sheriff to amend his return, if an amendment thereof, according to the facts, would show such personal service.

APPEAL from the Circuit Court for *Pierce* County.

Action on a promissory note, brought by *Moyer*, the payee, against *Cook*, the maker. The sheriff's return showed a service of the summons and complaint upon the defendant, by leaving true copies thereof at his last and usual place of residence in *Pierce* county, "with his brother, Gamalien *Cook*, a person of suitable age and discretion, and informing him of the contents thereof, on the 4th day of September, 1858." On the 27th day of the same month, the clerk of the court, upon application of the plaintiff's attorney, and his affidavit of no answer or demurrer, entered judgment against the defendant for the amount claimed to be due on the note, with costs, &c. In January, 1859, *Cook* moved to set aside the judgment on the ground that there had been no legal service of the summons, and that the clerk had no authority to enter judgment without proof of *personal* service. The motion was founded upon an affidavit by the defendant, that he had resided since August 2, 1858, in *Rock* county, and

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that no service of the summons had been made on him as required by law, &c. The plaintiff's counsel asked leave to have the sheriff amend his return according to the facts, by inserting the words, "defendant not found," and after the word "county," the words "in this state," and after the word "Cook," the words "a member of the family;" but the court refused to grant such leave, the plaintiff excepting, and ordered that the judgment be set aside with costs; from which order the plaintiff appealed.

P. V. Wise, for appellant:

1. The summons and complaint were served according to law. Code, p. 14, § 38, and subdivision 4 of § 39; 15 John., 196. 2. The defendant did not show that manifest injustice had been done him; he did not even make an affidavit of merits or ask for leave to answer. How. Code, 560; 18 Barb., 387-392; 2 E. D. Smith, 125. The affidavit should have shown a defense. 6 Hill, 623.

J. S. White, for respondent:

Section 27, chap. 132, R. S., is the only statutory provision authorizing the clerk to enter judgment on failure to answer, and that expressly requires proof of personal service. The power there conferred on the clerk was unknown to the practice at common law, and the grant must be strictly construed.

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By the Court, PAINE, J. If the amendment of the sheriff's return according to the facts, would have shown a good service, so as to authorize the entry of the judgment by the clerk, it should have been allowed. But we do not think the amendment proposed would show such service. Section 27, chap. 132, R. S. 1858, authorized an entry of judgment by the clerk only on filing proof of "*personal service*." Sec. 9, chap. 124, provides that the summons shall be served by delivering a copy "to the defendant personally," or if not found, by leaving it at his usual place of abode, &c. We think the personal service required by sec. 27, chap. 132, is only that where the copy is delivered to the defendant personally, as required by sec. 9, chap. 124, and not that where it is left at his place of abode. This is the strict meaning of personal

service. It is the actual delivery of the process to the defendant in person, as distinguished from other modes of service which the law allows.

It was argued with some force by the appellant's counsel, that as the other subdivisions of sec. 27 provide only for an application to the court for judgment where the service was by publication, it is to be presumed that the legislature intended by "personal service" in the first subdivision, all other modes of service except that by publication. But as the validity of this first subdivision, in authorizing a judgment without the intervention of any judicial officer whatever, has been questioned, and was sustained last term by a divided court, we are inclined not to extend it by construction beyond what its words clearly import. And we hold, therefore, that the personal service there required is an actual service upon the defendant. In case of service by copy left at the defendant's place of abode, the plaintiff should apply to the court for judgment.

The order appealed from is affirmed, with costs.

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DODGE COUNTY MUTUAL INSURANCE COMPANY VS. ROGERS.

In an action upon a fire policy, the court refused to instruct the jury that any increase of the risk after the insurance was effected, by means within the control of the assured, rendered the policy void; the policy containing an express condition to that effect, and there being some evidence tending to show a breach of the condition: *Held*, that the instruction should have been given.

Where the application for a fire policy contains a question to be answered by the applicant, as to the mode in which the building offered for insurance is to be occupied, and the agent of the insurance company is informed by the applicant of the intended mode of occupation, but fills out the application without inserting any answer to that question, the company, by issuing the policy without such answer, waives it, and cannot afterwards object to any use of the premises of which the agent was fairly notified. *Otherwise*, where the agent has knowledge only that the building has been at some previous time used for a hazardous business, but does not know that it is being used in that manner at the time of the application, or that it is the custom or intention of the applicant so to use it.

ERROR to the Circuit Court for *Fond du Lac* County.

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Rogers against loss by fire, upon a barn and its contents, for five years from the 18th of November, 1856. These having been destroyed by fire in July, 1858, and the company having refused to pay the loss, *Rogers* brought this action to recover the sum insured. Among the conditions annexed to and forming part of the policy, was the following: "If, after insurance effected, the risk shall be increased by any means whatever within the control of the assured, such insurance shall be void and of no effect." The defense set up in the answer was, among other things, that for about one year before the loss of the barn, and up to and at the time of the loss, it had been and was used by the plaintiff, without the knowledge or consent of the defendant, as a carpenter's shop, sleeping room, &c., and that the risk had been thereby greatly increased. On the trial the plaintiff, as a witness in his own behalf, testified as follows: "I cannot say that the barn was used as a sleeping room at the time of the application for the policy. It had been used for that purpose during the previous summer. I had lumber in the barn at the time the policy was applied for, both dressed and undressed. The barn, at and before the time of making the application, had been used for dressing lumber. There was a carpenter's work bench in the barn at the time the application for the policy was made. The agent, McKee, knew at the time the application was made, that the barn had been used for such purposes, for I told him of it, and he had seen the lumber stored in the barn. The application bears date the day it was made. I do not know that there was a carpenter at work in the barn on that day. I cannot say that there were any beds in the barn at that time. The application was made at Ripon, four miles from the barn." The application, as filled up, contained no answer to the question, how the barn was occupied. The plaintiff also introduced evidence of the insurance, loss, &c. .

The defendant introduced evidence tending to prove the facts alleged in its answer.

Among the instructions to the jury asked for by the counsel for the defendant, and refused by the court, was the following: "Every increase of the risk after the insurance, with-

in the control of the insured, renders the policy void," to the refusal to give which, the defendant excepted. Verdict for the plaintiff, and judgment accordingly.

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Ware & Miner, for the plaintiff in error, contended that the instruction refused was merely a reiteration of one of the conditions of the policy, and should have been given.

Crane & Runals, for the defendant in error, cited in support of the refusal of the court to give such instruction, 8 Conn., 458, and *Harrison's Digest*, 8492.

By the Court, PAINE, J. We shall not attempt to notice all the numerous exceptions taken by the plaintiff in error, as we think the judgment must be reversed for the refusal of the court to instruct the jury as requested, that "every increase of the risk after the insurance, within the control of the assured, rendered the policy void." This language can be fairly held to include only such an increase of the risk as was caused or permitted by the assured. And, so construed, there can be no doubt of its correctness as a legal proposition. Indeed, the policy itself contains an express provision to that effect.

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It is claimed by the counsel for the defendant in error, that the barn had been previously used for dressing lumber, and for sleeping purposes, and that this was known to McKee, the agent of the company, who filled out the application; and that this being so, the company is precluded from raising any objections upon these grounds. There are, undoubtedly, cases which support the position that where facts relative to the condition of the property are stated to the agent, or are known to him, and he fills out the application, without stating them, the company cannot avoid the policy by reason of their not being stated. But we cannot see that this principle can be so applied as to cure the error here. For the plaintiff himself, who is the only one who testified on the point, did not say that the barn was used as a carpenter's shop at the time the application was made, or as a sleeping-room, but that it had been used for dressing lumber the season before, and that this was known to McKee. Now it does not follow that an agent, know-

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ing that the premises have been previously used for more hazardous purposes than they are then used for, is to assume necessarily that the owner intends thereafter to use them for such purposes. And it does not appear here that the fact was communicated to McKee in such language as informed him that it was a habit or a custom of the owner to use the barn for those purposes, and from which he might infer an intention to continue such use. We cannot say, therefore, that it sufficiently appears from the evidence presented here, that McKee was so informed of those facts as to make the company responsible for his neglect to state them in the application. This question should have been submitted to the jury, whether the agent was fully informed by the plaintiff of his intention to use the barn as a carpenter's shop, and as a sleeping-room, during the life of the policy. If he was, he having filled out the application, and having inserted no answer to the question as to how the premises were occupied, it may well be said that the company, by issuing the policy without such answer, waived it, and could not afterwards object to any use of the premises of which the agent was fairly notified.

But if the jury should find that the agent had no notice of the intention to use the barn for the purposes mentioned, and that it was not actually so used at the time of the application, then the question would be, whether the plaintiff had subsequently occupied it for those purposes, and if so, whether that increased the risk. And they should have been instructed that if these facts were found in the affirmative, it would avoid the policy.

But as the court refused this instruction, the judgment must be reversed, with costs, and a new trial awarded.

MILWAUKEE AND NORTHERN ILLINOIS RAILROAD COMPANY VS. FIELD.

The act to amend the charter of the "Fox River Valley Railroad Company," approved March 11, 1859, changed the name of that company, and made some amendments to its charter, but did not create a new corporation.

The provision in the amendatory act, requiring that all moneys received by said corporation should be faithfully and exclusively applied by the "Milwaukee and Northern Illinois Railroad Company," the same as under its former title, to the construction of its line of road from Milwaukee to the state line, &c., must be understood as referring to the line established by the original charter.

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That provision does not operate to prevent the building of the road from Rochester to Waukesha, as authorized by the original charter, but amounts merely to a legislative postponement of the construction of that part of the road, until the road from Milwaukee to the state line shall be completed.

A subscription for stock of said company is not invalid because it contained conditions that it should not be payable until needed for the construction of a certain portion of the railroad, and that the amount paid should be applied solely to the construction of such portion of the road, and should draw interest till a certain portion of the road should be completed.

APPEAL from the County Court of *Milwaukee* County.

This action was brought by the "Fox River Valley Railroad Company" for money due on a subscription to its capital stock. Before the trial an amended and supplemental complaint was filed, which averred that on, &c., the defendant subscribed for ten shares of said company's stock, at \$100 each, payable in certain installments, in the subscription and in the complaint specified, with a stipulation that the amount paid thereon should bear ten per cent. interest from the time of payment until twelve miles of said company's road should be completed; there being also written on the fly-leaf of the subscription book an agreement, forming part of said contract, signed by the president of the company, as follows:

"*Fox River Valley Railroad Stock Subscription*: It is understood by and between the Fox River Valley Railroad Company and the subscribers to the capital stock of said company whose names appear on the following pages, that the amount due on such stock, and liable to be called for by the terms of subscription, is not to be considered due or liable to be called for, until the same shall be necessary for the construction of, or procuring the right of way on, that portion of the line of road of said company extending from the village of Rochester to the city of Milwaukee, and also not until a sufficient amount of stock has been subscribed, or other means obtained, to warrant, in the judgment of the board

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of directors of said company, the commencement of the construction of that portion of the line above named, and that all sums received from said subscribers shall be applied only to the construction of said part of said road. Milwaukee, Feb. 12, 1856." The complaint also contained the necessary allegations to show that, according to the terms of the defendant's subscription, the sum sued for had become due. It also averred that by an act of the legislature, approved March 11, 1859, the name of the plaintiff was changed to "The Milwaukee and Northern Illinois Railroad Company."

The answer was, in effect, a general denial, with leave, by stipulation, to give in evidence any matter of avoidance, as if specially pleaded.

On the trial the plaintiff offered in evidence the charter of the Fox River Valley Railroad Company, (Priv. Laws of 1853, p. 350), and the act amendatory of its charter, approved March 11th, 1859. Priv. Laws of 1859, p. 119. The former act, by its ninth section, gave the company power to construct a railroad from the southern line of Wisconsin at a point designated; "thence in a northerly course to the village of Waukesha, with power to construct a branch of said road from some point on said road north of the village of Rochester to the city of Milwaukee." The tenth section was as follows: "If said corporation shall not within two years from the passage of this act, commence the construction of said railroad, and within ten years complete the same, then the rights, privileges and powers of said corporation under this act, shall be void." The act of 1859 declared that the name of the Fox River Valley Railroad Company was thereby changed to The Milwaukee and Northern Illinois Railroad Company, and enacted that nothing therein should be construed to release any stockholder from his subscription to the capital stock of the company theretofore made, but all money which should thereafter be paid on subscriptions made to said Fox River Valley Railroad Company, or which should be realized on securities, &c., should be received and receipted for in the name of the Milwaukee and Northern Illinois Railroad Company, and should be faithfully and exclusively applied by said Milwaukee and Northern Illinois Railroad

Company, the same as under the old title, to the construction of said company's line of road from Milwaukee to the state line at the point designated in the charter to which said act was amendatory. The 4th section of this act repealed the 10th section of the act of 1853.

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The plaintiff then produced a witness, and offered to prove by him the other matters alleged in the complaint. The defendant's counsel objected to the introduction of any testimony, because the plaintiff was a new corporation created in 1859, and the suit was commenced prior to that time; because the plaintiff had no right to maintain its action in its present form, and because the act of March 11th, 1859, repealed and took away the right to build a railroad from Rochester to Waukesha; which objection was sustained, and the plaintiff excepted.

Thereupon, under the direction of the court, the jury rendered a verdict for the defendant, and judgment was entered thereon.

Emmons & Van Dyke, for appellant:

I. The defendant is not discharged from his subscription in consequence of any thing in the act of March 11, 1859.

1. In the absence of any right reserved to the legislature to amend the charter, there are many changes therein, which, if made and accepted by the company, would discharge the stock subscribers. But the change must be a *fundamental* one; one by reason of which the money of the subscriber is to be applied to an object different from that to which he pledged it by his subscription; a change of the enterprise so radical, that he may well answer, *non hæc in fœdera veni*. So long as the original objects to which he contemplated devoting his money, are preserved, and when the change sought is consistent with the terms of the subscription, and designed to facilitate the enterprise, the objection cannot prevail. Granting what was suggested by counsel on the motion for nonsuit (but what we deny), that the amendatory act took away the right to build a railroad from Rochester to Waukesha, that is not one of those fundamental changes in the charter which could affect the defendant's contract, because he had therein expressly stipulated, that his subscription should

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be exclusively applied to the construction of the road from Rochester to Milwaukee. The defendant and his co-subscribers were clearly not interested in extending the line of road to Waukesha, but the contrary. To this point counsel cited *Union Locks and Canal vs. Towne*, 1 N. H., 44; *Middlesex T. Corp. vs. Locke*, 8 Mass., 268; *Same vs. Swan*, 10 Mass., 384; *Hart & N. H. R. R. Co. vs. Crosswell*, 5 Hill, 383; *Winter vs. Muscogee R. R. Co.*, 11 Geo., 438; *Indiana & Ebensburgh T. Co. vs. Phillips*, 2 Penn. Rep., 184; *Irvin vs. The Turnpike Co.*, 2 id., 466; *Gray vs. Monongahela Nav. Co.*, 2 Watts & Serg., 156; *Stevens vs. Rutland & B. R. R. Co.*, 1 Am. Law Register, 154; *Macedon & B. Plank R. Co. vs. Lapham*, 18 Barb. S. C. R., 312; *Greenville & Col. R. R. Co. vs. Coleman*, 5 Richardson (S. C.), 118; *Kean vs. Johnson & Central R. R. Co.*, 1 Stockton's Ch. Rep., 401; Redfield on Railways, 91, § 10; Pierce on Am. Railroad Law, 36-46.

2. Section 1 of Article XI of the constitution of this state, entitled "Of Corporations," provides that all general or special acts, enacted under the provisions of that section, may be altered, amended or repealed by the legislature at any time after their passage. The defendant's subscription was made with reference to the charter as controlled by the constitution, which formed a part of the contract, and hence the right to alter or amend was contemplated. Many of the states have, either in charters themselves, or in general statutory provisions, or in their constitutions, reserved to the legislature a power to alter or amend charters at pleasure. Such reservation would seem to have prevailed in order to enable the legislature to compel corporations, from time to time, to conform to the changing policy of the state. There may be limits beyond which the legislature cannot go, in the exercise of this right to alter or amend, without discharging contracts which the corporation may have previously made with third parties. It might attempt to declare an alteration so utterly subversive of the objects for which the corporation was established, as would, if carried out by the company, make it unconscionable to enforce subscriptions to its capital stock, and such as would trench upon the inviolability of contracts. But such an alteration could not be made under

the constitutional reservation. It would destroy the original corporation and would be an abuse of the right to "alter" or "amend." No instance has occurred, so far as we can learn, in which any change in a charter actually made has been decided not to be within such reserved right; and this, though we find cases where the value of the stock has been diminished by the action of the corporation under the legislative sanction; where new burdens have been imposed on the corporation, and thus indirectly on the stockholders; and where they have been compelled to amalgamate their stock with that of other corporations; and where the corporation has been allowed to contribute, by stock subscriptions, to other and independent corporations. No case has come up to the definition of a "fundamental" alteration. And we shall find the rule to be, that the stock subscriber will be taken to have made his contract with reference to any alteration or amendment of the charter which the legislature might constitutionally enforce upon the corporation itself; and that such is held to be the measure of the change or alteration which will not discharge the promise to pay for stock. Pierce on Am. Railroad Law, 93 and onward. The counsel, under this point, cited and commented upon the following authorities: Redfield on Railways, p. 95, and note 6, p. 94. *Cork & Youghal Railroad vs. Patterson*, 37 Eng. L. & E. R., 398; *Ware vs. The Grand Junction Water Works Co.*, 18 Eng. Cond. Ch. Rep., 126, cited by BENNETT, chancellor, in *Stevens vs. Rutland & B. R. R. Co.*, *supra*; *Greenville & Col. R. Co. vs. Coleman*, *supra*; *Colvin vs. Liberty & Abington T. Co.*, 2 Carter (Ind.), 511; *Railsback vs. Same Company*, 2 Carter, 656; *Northern R. R. Co. vs. Miller*, 10 Barb., 260; *Pacific R. R. Co. vs. Renshaw*, 18 Mo. Rep., 210; *Peters vs. St. Louis & Iron Mountain R. R. Co.*, 23 Mo., 111; *Central Plank R. Co. vs. Clemens*, 16 Mo., 359; *Pacific R. R. Co. vs. Hughes*, 22 Mo., 291; *Meadow Dam Co. vs. Gray*, 30 Me., 547; *Banet vs. A. & S. R. R. Co.*, 13 Ill. Rep., 504; *Sparrow vs. Evansville & Crawfordsville R. R.*, 7 Indiana, 369; *Moore vs. Hudson River R. R. Co.*, 12 Barb., 156; *Noyes vs. Spaulding*, 27 Vt., 420; *White vs. Syracuse & Utica R. R.*, 14 Barb., 559; 1 Kernan, 102; 4 *id.*, 336, 348.

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II. The fact that the subscription is a conditional one does not render it void as against public policy. The conditions contain nothing against the spirit of the charter. The first is, that installments should not be called for until necessary for the construction of, or the procuring of the right of way on, that portion of the line of road extending from the village of Rochester to Milwaukee. Here is no attempt to change the line, or secure the adoption of any particular route, but the one provided for by the charter itself is expressly referred to; and it is not inconsistent with good morals or sound policy, that a stock subscriber, who was at liberty to give or refuse his aid, should insist that his money should be expended on a particular part of the road. The execution of this stipulation could not in any way contravene any of the provisions of the charter, in their letter or spirit. Indeed, the discretion exercised in receiving these subscriptions, is clearly granted to the directors. See secs. 4, 16 and 17 of the charter. Another condition is, that calls for installments shall not be made "until a sufficient amount of stock has been subscribed, or other means obtained, to warrant, in the judgment of the board of directors, the commencement of the construction of that portion of the line" extending from the village of Rochester to the city of Milwaukee. This is a wise provision, and, of course, cannot render the contract "void as against public policy." On the subject of conditional subscriptions for railway stock, counsel cited *McMillan vs. Maysville & Lexington R. R. Co.*, 15 B. Monroe, 218; *Henderson & Nashville R. R. Co. vs. Leavell*, 16 id., 358; *Wilmington & Raleigh R. R. Co. vs. Robeson*, 5 Iredell, 391; *Carlisle vs. Terre Haute & Richmond R. R. Co.*, 6 Ind., 316; *Fisher vs. E. & C. R. R. Co.*, 7 id. 407; *Cumberland R. R. Co. vs. Baab*, 9 Watts, 458; *Chapman vs. Mad River & L. Erie R. R. Co.*, 6 Ohio St. Rep., 119; *Central T. Co. vs. Valentine*, 10 Pick., 142, 146; *U. & S. R. R. Co. vs. Brinckerhoff*, 21 Wend., 139; *Butternuts & Oxford T. Co. vs. North*, 1 Hill, 518; *Ft. Miller & Ft. Edward P. R. Co.*, 17 Barb., 579; Pierce on Am. Railroad Law, 70 *et seq.*; Redfield on Railways, 77, 78 and notes. On the subject of public policy, see Story on Cont., sec. 546; *Kellogg vs. Larkin*, 3 Chand.

Wis. Rep., 133. Another objection urged to the validity of these subscriptions was founded on the agreement that paying subscribers should receive interest on amounts paid, until twelve miles of the road were completed and in operation, and the case of *Troy & Boston R. R. vs. Tibbits*, 18 Barb., 297, was cited in support of the objection. In this case Tibbits had stipulated for interest *until the entire road was done*, thus making it to his advantage to thwart the ultimate completion of the work, so long as it was earning his interest. In our case a stock subscriber has agreed to receive interest until twelve miles of the road shall be completed. It is very evident why he should demand it, and why directors should be willing to yield to such a condition. No man would stake his capital to-day, with no promise of a dividend for five years, against the same amount to be subscribed and paid several years hence, and let the last subscriber reap the same benefit as himself from the investment. But whether the court were right or wrong in the case referred to in 18 Barbour, the 3d and 4th sections of the plaintiff's charter show that the reservation of interest to these stock subscribers was within the discretion of the directors. See also the numerous cases already cited on the subject of conditional stock subscriptions. The issuing of "preferred stock" has been practiced by many railway companies, and in a number of the states of the union, without any express authority in their charters; and very large amounts of money have been advanced by European and American capitalists upon such stock, in the belief, (and with the highest professional authority in the land begetting the confident belief,) that this preferred stock was valid. If such stock is valid, then, by parity of reasoning, this merely interest-paying subscription is valid. We are not aware that any case has arisen where the courts have been called upon to decide upon the validity of such issues of preferred stock; but we believe that the opinion expressed by Judge REDFIELD in his *Treatise on Railways*, p. 593, that the power exists to create such stock, will be followed by our courts.

Jason Downer, for respondent:

I The act of March 11th, 1859, in fact, created a new

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corporation, and transferred the property of the old to it. It was conceded at the trial in the court below, that on the line of road authorized by the original charter, extending from Waukesha to the point of junction with the Milwaukee branch, no work of any considerable amount had been done, and not a rod of it finished. The act of 1859 provides that all the funds of the company shall be applied exclusively to the construction of the line of road from Milwaukee to the state line, and leaves the company entirely without means to construct the line from the Milwaukee branch junction to Waukesha. It is, therefore, equivalent to a repeal of so much of the charter as authorized that line to be constructed. It does more; it authorizes an entire new line from the city of Milwaukee to the state line. The southern point at the state line, and the Milwaukee terminus, are the only things in common between the roads authorized to be constructed by the two charters. If then, the act does not create a new corporation, the alteration thereby effected in the powers of the company, is such as will release the defendant as a stock subscriber. *Middlesex T. Cor. vs. Locke*, 8 Mass., 268; *H. & N. H. R. R. Co. vs. Croswell*, 5 Hill, 388; 1 N. H. Rep., 44; 2 Penn. Rep., 184; *M. & B. Plank Road Co. vs. Lapham*, 18 Barb., 312; *Winter vs. Muscogee R. R. Co.*, 11 Geo., 438; 27 Miss., 517; *Stevens vs. R. & B. R. R. Co.*, 1 Am. Law Register, 154; *Pierce on Am. Railroad Law*, 78-100. The reservation of a right to amend and alter the charter, is not sufficiently broad to cover a case like this. *Pierce on Am. Railroad Law*, 98 and 99; 7 Ind., 369. 1. The constitutional right to amend the charters of corporations, extends only to such acts as are of a political character, or for the public benefit. In this case the act of 1859 was evidently obtained at the solicitation of the directors of the corporation; at least, they—the new corporation and the old—having accepted it, it is the same as if the amendment was procured at their request. The alteration is, therefore, to be regarded as the voluntary act of the corporation. 2. The constitutional provision as to alteration applies only as between the corporation and the state, not between the former and its stock subscribers, or persons contracting with it. The corporation undertakes

to do certain things, and these it must do. If the state takes away its power, it may be its misfortune, but the persons contracting with it, are not for that reason to suffer.

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II. By the contract of subscription the defendant was not to pay his subscription until the same should be necessary for the construction of, or the procuring of the right of way on, that portion of the line extending from Rochester to Milwaukee. The plaintiff avers, that at the time when said payments were called to be paid, the amounts so called for were necessary for the construction of said line between those points. But this was before the act of 1859, which so alters the line of road, that Rochester is not a point in the new line. And it was necessary, in order to admit any testimony, after the passage of the amendatory act, to aver that Rochester was a point in the new line, and that said moneys were still necessary to construct the line between Rochester and Milwaukee.

III. The whole subscription contract, as set forth in the complaint, is illegal, against the policy of the law and void.

By the Court, DIXON, C. J. It is very evident from the provisions of the act of March 11th, 1859, that no new corporation was contemplated. It purports to be, and is, in fact, only an act changing the name of the old corporation, and making some slight amendments of its charter. If the name had not been changed, we doubt whether the counsel would ever have insisted that its provisions amounted to the creation of a new company. If the legislature had merely changed its name, by declaring that the Fox River Valley Railroad Company should thereafter be known and called the Milwaukee and Northern Illinois Railroad Company, and thereafter should sue and be sued by that name, &c., there can be little doubt that it would in law have been quite as effectual for the purposes intended, and that the company known by this new name would have succeeded to, or rather continued in, all the rights which it formerly possessed. It certainly cannot alter the question that the legislature have expressly declared that such shall be the effect of the act. Nor does this declaration afford any rea-

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son for saying that a new corporation was created. Neither do we think that the act made, or authorized the company to make, any change in the line of its route between the city of Milwaukee and the state line. After having changed its name, the act provides that nothing in it shall be construed to release any stockholder from his or her subscription theretofore made to the capital stock of the company; and that all money which shall thereafter be paid on subscriptions made to the Fox River Valley Railroad Company, or which shall be realized on securities given or to be given, shall be received and receipted for in the name of the Milwaukee and Northern Illinois Railroad Company, and shall be faithfully and exclusively applied by it, *the same as under the old title, to the construction of the said company's line of road from Milwaukee to the state line*; that holders of stock under the old, shall be entitled to receive in exchange certificates of stock under the new title; and *that the company under its new title shall be authorized to use all the rights, privileges and immunities contained in its charter as the Fox River Valley Railroad Company*. Whether called by the old or the new name, it is spoken of throughout as one and the same company; and where the act declares that "the moneys realized shall be faithfully and exclusively applied as under the old title to the construction of the company's line of road from Milwaukee to the state line," it must be understood as the line which was established by the charter.

The repeal of section ten of the original charter can by no means be said to deprive the company of the power to build the road from Rochester to Waukesha. Its authority to do this is conferred by section nine, the provisions of which are left unimpaired. Its repeal operates generally to remove the restrictions, as to the time of the commencement and completion of the road, which were imposed by it. Nor can we say that the declaration that the moneys realized shall be applied faithfully and exclusively to the building of the road from Milwaukee to the state line, operates to prevent the construction of that portion of it which extends from Rochester to Waukesha. When construed in connection with section nine and other parts of the charter, which remain in full

force, it amounts merely to a legislative postponement of the construction of the latter part of the road, until the former shall be completed.

This view of the statute of 1859 disposes of most of the objections raised by the respondent's counsel. There is certainly no room for saying that the stipulation for the application of the moneys subscribed, to the construction of that portion of the road extending from the village of Rochester to the city of Milwaukee, is against public policy. The argument of the appellant's counsel is a complete answer to this objection.

The powers conferred on the board of directors by the sixth section, are ample for the purpose of enabling them to agree to pay interest on the stock subscribed and paid for, until twelve miles of the road should be completed and in operation. In respect to all contracts, covenants and agreements touching their corporate affairs and business, the power conferred upon the directors of this company is of that enlarged and plenary character usually found in the charters of railroad corporations in this state; and it is not the province of this court, by violating the rules of plain grammatical analysis, to restrain or abridge this power, simply because it has been improvidently exercised by the managing officers, or exerted in a manner seriously detrimental or injurious to the best interests of the corporation or its stockholders. This court is no more the guardian of the interests of corporations than of private individuals; and can no more protect them from the effect of hasty or ill advised bargains or agreements, provided they have the authority to make them, than it can individuals. We know of no authority of law for drawing any such distinction. The question of what powers the company should possess, was a matter of legislative discretion in the first instance, and the legislature having exercised it, it is not for this court to say that they were improperly granted. As to past transactions, the evils, whatever they may be, must be endured. As to the future, the power of correction, if its exercise be needed, lies with the legislature.

The objection, that a new suit should have been com-

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menced after the change of name, we do not understand to be insisted upon. If it were, it is too technical to be countenanced in these days of liberality in all matters of amendment.

Many of the points so properly raised and so ably argued by the counsel in their printed briefs, have not received our attention in this opinion, partly from want of time, but principally because the appearance of those arguments in the report seems to render comment or discussion by us unnecessary.

The judgment of the county court must be reversed, and a new trial awarded.

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A clause in an assignment by an insolvent debtor for the benefit of creditors, authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may appear best and most to the interest of the parties concerned," is equivalent to authority to sell on *credit*, and such an assignment operates to hinder and delay creditors, and, as against them, is fraudulent and void. *Keep vs. Sanderson*, 2 Wis., 42, cited and adhered to.

Where the assignee under such an assignment, is summoned as garnishee under an attachment against the property of the assignor, by one of such creditors, and it appears on the hearing, that after the service of such summons he had converted the assigned property into money, or that before such service he had converted the same into money which then remained in his hands, he is to be regarded as indebted to the assignor for the money so received by him, and the creditor is entitled to judgment against him, as garnishee, accordingly.

A judgment against the defendants in an attachment suit is not void for want of jurisdiction, because the defendants were non-residents, and were not served with process, and because at the time of rendering such judgment the garnishee had filed an answer denying that he was indebted to the defendants, or had any property belonging to them in his possession, the issue upon which answer was then undetermined, if it appear that such issue was afterwards determined against the garnishee, and judgment rendered against him, it being the *fact* of the garnishee's indebtedness and not its ascertainment, which conferred jurisdiction against the principal debtors.

Where an issue is made between the plaintiff in an attachment suit and a garnishee, upon the answer of the latter, *it seems* that such answer is never admissible in evidence on the trial of such issue; but where, under the law allowing parties to be witnesses in their own behalf, the garnishee caused his own deposition to be taken and read on the trial of such issue, there was clearly no error in excluding his answer as evidence.

Where a judge files a finding, which is excepted to as not being in accordance with the requirements of the Code, he has power to file an amended finding, and the time and manner of his doing so must depend in a great measure upon his discretion.

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Where the finding of the court sets forth at large the assignment under which a garnishee received the property for which he is sought to be made accountable, and that assignment is "by its very terms fraudulent in law and in fact," the invalidity of the assignment sufficiently appears by such finding.

APPEAL from the Circuit Court for *Dane* County.

On the 5th of June, 1854, a writ of attachment was issued out of the circuit court for Rock county, in favor of *John M. Keep*, against Charles R. P. Wentworth and Thomas C. Manchester, with the affidavit of said *Keep* annexed, setting forth, among other things, that he had good reason to believe that said Manchester and Wentworth were not residents of this state, and that they had assigned and disposed of their property with intent to defraud their creditors. On the same day said *Keep* filed an affidavit, stating, among other things, "that he verily believed that *George B. Sanderson* had property, credits and effects in his possession, to wit: money, notes and accounts, mortgages and merchandise, belonging to the above named defendants (Manchester and Wentworth), and that said *Sanderson* was indebted to said defendants.

On the 9th of June, 1854, *Sanderson* was summoned as garnishee, by a notice requiring him to appear before the circuit court of Rock county, on the third Monday of November, 1854, to answer on oath, &c. On the 19th of June, 1854, an affidavit was made and filed by the attorney of the plaintiff, stating that the time of holding said court had been changed from the third Monday to the fourth Monday of November, of which he was not aware until the 10th day of said month of June, and on the 20th day of said month an order was made by the circuit judge, striking out the word "third" before the words "Monday of November, 1854," and inserting the word "fourth" instead thereof, in the attachment as well as in the notice served upon *Sanderson*, and a copy of said order was served upon *Sanderson* on the first day of July, 1854. On the 25th of November, 1854, the sheriff levied said attachment upon several parcels of real estate in Rock county, as the property of said Manches-

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ter and Wentworth. On the 13th of December, 1854, *Sanderson* made his answer as garnishee. In this answer he states that he had no property, goods, chattels, notes, mortgages, or choses in action, belonging to the defendants (*Manchester* and *Wentworth*), or either of them, in his possession or under his control, at the time of the service of the garnishee process on him in this case, or at any time afterwards. He further states that on the 19th of February, 1852, said defendants made an assignment to him in writing, by virtue whereof there came into his hands, on that day, from the defendants, goods, wares and merchandise to the amount of about \$7,000, notes, mortgages and accounts to the amount of about \$6,000, and real estate to the amount of about \$2,000, as the same were invoiced, all of which, or the proceeds thereof, he still holds under said assignment. He annexed to his answer a copy of the assignment, which is the same that is recited at large in the case of *Keep vs. Sanderson*, 2 Wis., 42, and contained a clause authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may [might] appear best and most to the interest of the parties concerned." Notice of the pendency of the attachment suit was duly given to *Manchester* and *Wentworth* by publication. In March, 1855, *Keep* filed his declaration in the attachment suit in the usual form, with money counts, with a notice that he would give in evidence two notes of the defendants, therein described, for \$2,199 46 each, and in the same month the venue of said attachment suit, as well as of the garnishee proceedings against said *Sanderson*, was changed to the Dane circuit court. On the 16th of May, 1855, judgment was rendered in the Dane circuit court in favor of the plaintiff *Keep*, against *Manchester* and *Wentworth*, for \$5,263 38. On the same day *Sanderson* made, in open court, under oath, a further answer as garnishee, in which he denied any indebtedness whatever to *Manchester* and *Wentworth*, or that he had in his hands any property, moneys or credits belonging to them, over and above his liability as garnishee in previous attachment suits.

On the 11th of December, 1856, on motion of the plain-

tiff's attorney, it was ordered by the court "that the plaintiff may make an issue upon the answer of said *Sanderson* within one hundred days, as follows: The plaintiff shall file and serve his declaration, alleging that the said *Sanderson* is indebted to said Manchester and Wentworth in the sum of ten thousand dollars, and also, in another count, that the said *Saulerson* has in his possession money and property belonging to said Manchester and Wentworth of the value of ten thousand dollars; that said *Sanderson* shall plead issuably to said declaration within ten days," &c. A declaration was accordingly filed, and *Sanderson* pleaded thereto in denial of each count. The trial of said issues was submitted to the court, without a jury. On the trial the plaintiff read in evidence the record of his judgment against Manchester and Wentworth, above referred to, and introduced proof tending to show that the defendant *Sanderson* had, by the sale of the goods and real estate, and collection of the notes and accounts embraced in the assignment before mentioned, received sufficient moneys to pay the plaintiff's judgment, after satisfying the claims of such creditors of Manchester and Wentworth as had commenced proceedings against him as garnishee, prior to the service of the process upon him in this case. In connection with this proof, the plaintiff put in evidence the assignment under which *Sanderson* took possession of said property, and which was admitted to be the same recited at large in the report of the case of *Keep vs. Sanderson*, 2 Wis., 42, and which was, by the supreme court in that case, declared null and void as to the creditors of Manchester and Wentworth.

The defendant then offered to read in evidence his answer as garnishee, made on oath in open court in this cause, in May, 1855, to the introduction of which the plaintiff objected, because, the answer not having been satisfactory to him, he had made up an issue, which issue should be tried irrespective of the answer, and because, on the trial of that issue, the defendant was a competent witness, and his deposition had been taken on his own behalf and was on file. The court decided that the answer was not admissible in evidence, and the defendant excepted.

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It was here admitted by the parties that *Sanderson* had been summoned as garnishee of Manchester and Wentworth, in several cases before the commencement of the present suit, and had therein been adjudged garnishee on account of what came into his hands under said assignment, and had, on the 1st of November, 1855, paid to the creditors of said Manchester and Wentworth, \$8,165 on judgments in such cases.

The defendant then offered in evidence the record of a suit in the circuit court for Iowa county, commenced before this suit was instituted, in which Erastus Corning and others were plaintiffs, and Manchester and Wentworth were defendants, and in which he (the defendant) was summoned and answered as garnishee, by which it appeared that said circuit court, on his answer, (no issue having been made up between him and the plaintiffs in said cause) rendered judgment against him for only \$183 03, although the judgment against said Manchester and Wentworth was for a much larger sum; which amount of 183 03 was paid to said Corning and others, and formed part of said sum of \$8,165 admitted as above—the defendant claiming that said proceedings were a bar to this suit. To this testimony the plaintiff objected, because he was not a party to that suit, and because no issue was made up therein upon the answer of said garnishee, but the plaintiff therein was satisfied to take what he could get on the said garnishee's confession. The court decided that said record was not evidence for the purpose for which it was offered, to which the defendant excepted.

The defendant then offered to prove that in defending the cases in which judgment had been rendered against him as garnishee, and on which he had made said payments, amounting to \$8,165, he had paid \$300 costs, and \$1,200 lawyers' fees. The plaintiff "admitted the facts," but objected to the introduction of the testimony, and the court sustained the objection, and the defendant excepted. The deposition of the defendant was then read as evidence in his own behalf. He testified that the money realized by him under the assignment was made out of real estate, to wit, several lots in the town of Beloit, which sold for about \$1,500, half in six and

the balance in twelve months' time; and out of goods sold to Hackett and Hodge on twelve months' time, to the amount of \$2,400; and by sale of goods from the store at different times; and from collections of accounts, notes, &c., due Manchester and Wentworth from sundry persons; and that he had "paid over to the creditors of Manchester and Wentworth every dollar which he had received from the assets of that firm, besides some \$1,200 in expenses of litigation."

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There was other evidence on both sides upon the questions of fact in issue between the parties, but as in the judgment of this court the proof was sufficient to sustain the finding of the circuit court as to the facts, and as no question of law arises upon such evidence, it is here omitted.

After the evidence was closed, the judge of the circuit court signed and filed a finding, as follows: "The court finds as facts, that the said *George B. Sanderson* was, on the day of service of process on him in this cause as such garnishee, to wit, the 9th day of June, A. D. 1854, indebted to the said T. C. Manchester and C. R. P. Wentworth in the sum of six thousand seven hundred and sixty-nine dollars and eighty-two cents; and the court finds, as matter of law, that the said *John M. Keep*, plaintiff, is entitled to a judgment in his favor, against the said *George B. Sanderson*, for the said sum of six thousand seven hundred and sixty-nine dollars and eighty-two cents. Dated June 3d, A. D. 1859." To this finding the defendant excepted, as not being in accordance with the requirements of the code.

On the 23d of July, 1859, the judge filed the following as an amended finding, the record stating that the finding first filed was hastily drawn by the counsel for the plaintiff, and did not fully set forth the facts found by the court: "The court finds, as matter of *fact*, that the said T. Clark Manchester and Charles R. P. Wentworth did, at Beloit, Rock county, on the 19th of February, 1852, make, execute and deliver to said defendant, *George B. Sanderson*, a certain assignment, in words and figures following, that is to say: [here reference is made to the assignment previously set forth in the record, which is the same recited at length in *Keep vs. Sanderson*, 2 Wis., 42,] and the said Manchester and

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Wentworth, on the said 19th day of February, 1852, delivered to said *Sanderson*, under said assignment, goods, wares and merchandise, and notes and accounts, of the value of upwards of twenty thousand dollars, which said *Sanderson* afterwards converted to his own use; and that said *Sanderson* has paid to different creditors of said Manchester and Wentworth, on judgments by which he has been adjudged garnishee of said Manchester and Wentworth, and in cases where said garnishee had been summoned as such before he was summoned as garnishee in this cause, the sum of \$8,165 and no more; and that all the avails of said property assigned, except said \$8,165, remained in the hands of such garnishee at the time he was summoned as garnishee in this cause; and the court finds, as matter of fact, both of said issues joined in this cause for the said plaintiff, and finds that on the day when said *Sanderson* was summoned as garnishee in this cause, to wit, said *Sanderson* was justly indebted to said T. C. Manchester and Charles R. P. Wentworth in the sum of ten thousand dollars; that said *Sanderson*, on the day and year last aforesaid, had in his possession money to the amount of ten thousand dollars belonging to said Manchester and Wentworth, and that there is now due the plaintiff on the judgment in his favor against said Manchester and Wentworth, recovered in a cause in which said *Sanderson* was summoned as garnishee, the sum of six thousand seven hundred and sixty-nine dollars and eighty-two cents, and which said ten thousand dollars so in said *Sanderson's* hands, is the same which the court finds the said *Sanderson* owed to said Manchester and Wentworth. And as matter of law, the court finds that the said *John M. Keep*, plaintiff, is entitled to judgment in his favor, against the said *George B. Sanderson*, for the said sum of six thousand seven hundred and sixty-nine dollars and eighty-two cents. June 3d, A. D. 1859. HARLOW S. ORTON, Judge." To this finding the defendant duly excepted, insisting that the court had lost jurisdiction by its first finding. Motion for new trial overruled, and judgment for the plaintiff.

Rockwell & Converse (with whom was *James S. Brown*), for appellants, contended that as Manchester and Wentworth

were non-residents, and not served with process, there was no jurisdiction to render a judgment against them, unless their property was attached, or the garnishee was indebted to them, or had their property in his hands, and as the garnishee denied having any such property, or being indebted to them, and as the issue on that answer had not been determined at the time of entering judgment against Manchester and Wentworth, the court had no jurisdiction to render that judgment. 2. The writ of attachment and notice to answer were returnable when there was no term of court. The amendments that were made were jurisdictional, and cannot be allowed in suits of this kind. 3. The filing of the amended finding by the court in this case, was without authority. Chap. 132, § 19, R. S., 1858; *Sands vs. Church*, 2 Selden, 347. 4. The amended finding is insufficient and defective, because it fails to find that the assignment was void, or that it was ever so declared by the court. 5. Neither lands nor the proceeds thereof, are garnishable. If the conveyance was fraudulent, as argued, no title passed, and every creditor could seize the land; if the proceeds of the sale by the garnishee could be garnished, he would have to pay one creditor, and another would take the land. *Howe vs. Field*, 5 Mass., 390; *Dickinson vs. Strong*, 4 Pick., 57; *Ripley vs. Severance*, 6 id., 474; *Gore vs. Clisby*, 8 id., 555; *Bissell vs. Strong*, 9 id., 562; *Moor vs. Towle*, 38 Maine, 133; *Risley vs. Welles*, 5 Conn., 431; 7 N. H., 590; 13 Vt., 615; Drake on Attachment, 479-481. Notes held by Sanderson, whether those which were assigned originally, or those taken upon settlement of accounts or sales, cannot be garnished. Neither choses in action, nor any other claim or thing that cannot be exposed to sale on execution by the mere passing over by the garnishee, can be garnished. *F. & M. Ins. Co. vs. Weeks*, 7 Mass., 438; *Guilford vs. Holbrook*, 11 Pick., 101; 4 id., 57; *Andrews vs. Lullow*, 5 id., 28; *Perry vs. Coates*, 9 Mass., 537; *Lupton vs. Cutler*, 8 Pick., 298; *Copeland vs. Wells*, 8 Maine, 411. The garnishment refers to the time of its service for its operation; it affects the property or indebtedness then held or owing; it can hold no after accruing indebtedness, or after

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received money or property; it relates to the then status of property or debt. 12 Pick., 116; 6 id., 358; 1 Wis., 447; Drake on Attachment, § 667, and cases there cited. It appears from the evidence that very little, if any thing, subject to garnishment, was in the hands of *Sanderson* at the time the notice was served on him. 6. Garnishment is in the nature of a proceeding *in rem*; its aim is to invest the plaintiff with the right to appropriate to the payment of his claim, the property of the defendant found in the garnishee's hands, and in no case, with a single exception, can a person be held as garnishee, unless the defendant could maintain an action *ex contractu*; this exception is in the case of an assignment fraudulent in fact, in which case the personal property assigned as such, and capable of being sold on execution, can alone be held, and a judgment against the garnishee only exposes the personalty held by him, to sale on execution running against the property of the defendant in the attachment; in other words, the property is, by this proceeding, discovered and released from the pretended claim of the garnishee, and exposed to seizure. Drake on Attachment, §§ 479, 541, 543; *Belknap vs. Gibbens*, 13 Met., 471.

Mat. H. Carpenter, for respondent:

1. The finding sets out the assignment in full. This being void upon its face (*Keep vs. Sanderson*, 2 Wis., 42), it was unnecessary for the court to find, as *matter of fact*, that it was made with intent to hinder, &c. Moreover, the provision of the code as to findings did not apply. There was a feigned issue, and the finding was sufficiently full on *the issue joined*. 2. It was competent for the court to amend its finding. *People vs. Dodge*, 5 How. Pr. R., 47; *Sunls vs. Church*, 2 Seld., 347, 357. 3. Money realized on real estate, may be reached by the process of garnishment, though real estate itself cannot. 4. A garnishee, who has used the money of the defendant in his hands, and resists the claims of creditors upon the fund, will be charged with interest. *Willings vs. Consequa*, Peters' C. C. R., 301, 321; Drake on Attachment, § 689. 5. The defendant's answer was not admissible in evidence. *Lasley vs. Sisloff*, 7 How. (Miss.), 157. If ad-

missible, it was unimportant, as his deposition to the same effect was read. 6. The defendant must pay from his own funds the cost of resisting the just claims made against him as garnishee. Drake on Attachment, 1st ed., § 678, and cases cited.

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By the Court, PAINE, J. We have no doubt of the right of the judge below to amend his finding after an exception taken. The object of exceptions on the trial, and to the instructions of the court to the jury, is to call the attention of the judge to the particular point of objection, that he may correct at the time any thing which he may think needs correction. Where the trial is before the judge without a jury, and he afterwards files his finding, if, on exception afterwards filed, he has no power to amend it, one of the principal objects of an exception at the trial, for which these written exceptions are a substitute, would be defeated. We think the right exists, and that the time and manner of its exercise must depend in a great measure upon the discretion of the judge who tries the case. *Sinck vs. Church*, 2 Seld., 347, sustains such right of amendment. The amended finding we think sufficient to sustain the judgment. It finds the fact of the assignment, setting forth a copy of it. And although it does not say that the judge finds it fraudulent, yet this court has decided upon this identical assignment, that it must be deemed "by its very terms," "fraudulent in law and in fact." It was said that the court did not state in the finding that this was the same assignment previously decided upon by this court, and that although that fact was admitted on the trial, yet we cannot look to that admission in determining whether the finding itself is sufficient to support the judgment. This is perhaps true, yet we do not deem such statement necessary. For it appears at all events that the assignment set forth is in the same words as the other, and if the other is "by its terms fraudulent in law and fact," then this, which is in the same terms, whether the same instrument or not, must be equally so deemed. The court having decided that an instrument in those terms is fraudulent in law and fact, we think its invalidity sufficiently ap-

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pears in the finding, when its terms appear. The invalidity of the assignment is necessarily included in the general finding, that the proceeds of the property assigned were liable for the debts of the assignors.

It was claimed by the counsel for the appellant, that this court, in the case of *Kearney and others vs. Norton*, decided at the last term, had overruled the previous decision in the case of *Keep vs. Sanderson*. But certainly we did not intend to do so, and we think there is nothing in the opinion which warrants that conclusion. On the contrary, the decision in *Kearney vs. Norton* is placed expressly upon the different language of the assignment, which was not the same nor equivalent to that used in the instruments decided fraudulent in *Keep vs. Sanderson* and *Hutchinson vs. Lord*. It will be seen by reference to the latter case, (1 Wis., 313, *et seq.*) that great stress is laid on the use of the word "terms," in connection also with the word "prices." The latter word being used, it was held that the word "terms" must be held to relate to the time of payment, and imply a power to sell on credit. There is nothing in the reasoning that goes to show that the court would have extended the same rule to an instrument like that in *Kearney vs. Norton*, in which the assignee undertook to dispose of the goods, &c., to the best advantage "in his discretion," &c. As there are many matters upon which an assignee might be called upon to exercise a sound discretion in disposing of assigned property, even though not selling on credit, we construed that language in the instrument as referring only to such discretion as he might properly exercise, and not as implying an illegal discretion to do acts which would avoid the instrument, without intending to disturb the previous decisions upon the effect of specific words in an assignment. We shall therefore adhere, without hesitation, to the decision already made by this court, between these parties, upon this assignment, holding it void.

And we have no doubt the assignee is liable, although he had disposed of the identical property transferred, and received cash or other property in its stead. If this were not so, it would be very easy for a fraudulent assignee or pur-

chaser to elude all responsibility by a speedy disposition of the property, and putting the money in his pocket. The creditors may take the property or its proceeds in his hands.

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We think there was no error in refusing to admit the answer of the garnishee in evidence on the trial of this issue. An issue having been made, it would seem that it should be tried irrespective of the answer. *Lasley vs. Sisloff*, 7 How. (Miss.), 157. But as the law now is, the defendant was permitted to testify in his own behalf, and accordingly had his deposition taken, which was read in evidence. This being so, he certainly had all the benefit that he could have had from his answer.

Nor do we think there is any weight in the objection that there was a want of jurisdiction to render the judgment in the original attachment suit. The argument is this: The debtors being non-residents and not being served, there was no jurisdiction, unless their property or indebtedness was attached in the hands of the garnishee. But as the garnishee denied having any property or being indebted, and as this had not been determined at the time of entering judgment against the principal debtor, it is therefore claimed that there was no jurisdiction to enter that judgment; because, it is said, the jurisdiction must exist at the time, if it exist at all, and cannot be acquired by anything happening afterwards. This proposition is very true, but does not support the conclusion sought to be derived from it. For if it eventually turns out that the garnishee had property or was indebted, then the property or indebtedness was attached at the time of the service upon the garnishee. And it is that fact which gives jurisdiction against the principal debtor, and not its subsequent legal ascertainment. And the fact, if it exist at all, existed at the time of the entry of the judgment, and therefore jurisdiction existed, and was not conferred, but only ascertained, by the subsequent judgment against the garnishee.

We think the conclusion of the court below, as to the amount, warranted by the evidence, so far as to sustain this judgment, and must therefore affirm it, with costs.

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SAUNTRY VS. DUNLAP.

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The funds of a partnership cannot rightfully be applied by one partner to the discharge of his own separate debt, without the assent, express or implied, of the other partners.

Where one partner, without the consent of his copartner, mortgaged an undivided half of certain partnership property, to secure his own separate debt, and a third party purchased such property, and promised to pay the mortgagee one-half its value, but was afterwards compelled to pay the full value thereof as garnishee, under an attachment sued out by a creditor of the firm, it was held, that the consideration of his promise to pay the mortgagee had wholly failed, and the promise could not be enforced.

APPEAL from the Circuit Court for *La Fayette* County.

The plaintiff, *Joanna Sauntry*, sued, before a justice, to recover the price of a small quantity of mineral ore, and obtained judgment for \$12 96 and costs, from which the defendant appealed to the circuit court. It appears from the evidence that the plaintiff received, on the 8th of January, 1859, from one Sullivan, a mortgage upon an undivided half of a lot of wash dirt, or mineral ore, then lying at certain diggings worked by said Sullivan and one Harrington, to secure a debt of \$15 35, due her from Sullivan. About the 15th of April, 1859, the defendant agreed with the plaintiff and Sullivan to take the mineral at \$25 92, and pay the plaintiff one-half of that sum. The defendant took the mineral. On the 18th of the same month, one Baxter sued out an attachment against Harrington and Sullivan, for debts incurred in their mining operations, under which attachment *Dunlap* was summoned as garnishee, and answered, admitting his indebtedness to them in the sum of \$25 92, the price of said lot of mineral ore, and judgment was rendered against him for that sum, including costs, which he paid. Of this claim of Baxter, eight dollars accrued before the date of the plaintiff's mortgage, and the balance afterwards. There was evidence tending to show that at the time of issuing the attachment, Harrington and Sullivan had no property out of which Baxter's claim could be collected, unless the money due from *Dunlap* was applied to its payment. There was also proof that Harrington and Sullivan rented the land

on which their shaft was situated, from Baxter, and that Harrington had executed a mortgage on one undivided half of the mineral, to Baxter, to secure his individual debt, "in the fore part of the winter" of 1858-9. The rest of the evidence will sufficiently appear from the opinion of the court. The circuit court affirmed the judgment of the justice, and the defendant appealed.

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L. P. Higbee and *J. H. Knowlton*, for appellant, contended that the evidence showed a partnership between Sullivan and Harrington (15 Wend., 193; 18 id., 175; 9 John., 496; 1 Selden, 186); that the mortgage of a part of the partnership property by one of the firm for his individual debt, without the consent of his co-partner, gave the mortgagee no title as against the firm or its creditors (2 John., 280; 4 id., 251; 16 id., 38 and 106; 1 Am. Lead. Cases, 449), especially as the ore in controversy was the only partnership property, and was not more than sufficient to pay the claim of Baxter, with costs; and that, as the plaintiff had no title to the ore, the defendant's promise was without consideration.

Wakeley & Tenney, for respondent, contended that Sullivan and Harrington were tenants in common of the land, and held the mineral in the same way, each giving a mortgage on one-half thereof for his individual debt; that Baxter, by accepting such a mortgage from Harrington, became half owner of the mineral which he afterwards sought to treat as partnership property; and that neither the joint purchase of articles for their mining operations, nor their agreement to divide the mineral, made them partners, since it did not appear that the proceeds were to be divided, or expended on joint account. Coll. on Part., §§ 10, 20, 21; 1 Hill, 234; 15 Barb., 595.

By the Court, COLE, J. It was very ingeniously argued by the counsel for the respondent in this case, in support of the judgment of the circuit court, that Sullivan and Harrington were not partners in the business of mining, but that they were really tenants in common; and that consequently the mineral or lead ore which was the product of this business,

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was not partnership property, but was owned by them as tenants in common, so that each party could dispose of his own share of the same for the payment of his individual debt. It must be admitted that there is considerable force in this view of the case, but still we do not think that it is the correct view, or the one sustained by the facts as disclosed in the evidence. The respondent testified that Harrington and Sullivan were partners in the diggings; Baxter states that goods for the diggings were charged to them jointly; while Harrington swore that he and Sullivan took and worked the ground, from which the mineral was taken, as partners; that they were to pay the debts and expenses against the diggings equally, and share the balance between them, &c. It is, however, said, that even upon this testimony, Harrington and Sullivan were not properly partners, but tenants in common, since it appeared they were to divide the mineral, and not the proceeds thereof after sale, and their relation is likened to that which exists between two persons who agree to work a farm on shares and to divide the crops, each taking his own share as a compensation for his labor. In the latter case the parties have been held to be tenants in common in the products, and not partners. *Putnam and others vs. Wise*, 1 Hill, 234; *Dinehart vs. Wilson*, 15 Barb. S. C. R., 595, and cases there cited. But we think a fair construction of the evidence shows that Harrington and Sullivan understood and supposed that they were carrying on the mining business as partners, that the expenses thereof were to be placed to their joint account, and that they contemplated a sale of whatever mineral they might discover, and a division of the proceeds. That a communion of profit and loss—the distinguishing characteristic of a partnership—may exist in a mining adventure, as well as in any other branch of business, probably will not be disputed or denied. (See *Jefferys vs. Smith*, 1 J. & Wal., 293.) That the parties so regarded the nature and incidents of this mining business, is equally clear from the evidence.

Under the facts and circumstances of this case, therefore, we deem it fair to assume, that the mineral or lead ore which Sullivan mortgaged to the respondent, was partnership prop-

erty, and the question arises, could he, without the knowledge or consent of his co-partner, sell or transfer his interest or share in that property, for the purpose of securing his individual debt, and would the purchaser hold the property, as against the partnership or its creditors? It seems to be well settled that the funds of a partnership cannot be rightfully applied by one partner to the discharge of his own separate debt, without the assent, express or implied, of the other partner, and that to do so is equally injurious to the partners and the creditors of the firm. The cases upon this subject are very fully collected in the note to *Rogers vs. Batchelor*, 1 American Leading Cases, 446. The creditors of the firm have the right to be first paid out of the partnership property, and when partnership stock has been applied in satisfaction of a private debt, due from one of the partners, it has been deemed fraudulent as to the creditors of the company.

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It seems the respondent was well aware that Harrington and Sullivan were partners in the diggings, and she must therefore have known that it was partnership property which the latter attempted to mortgage to her. The mineral being partnership property, it follows that the joint creditors had a primary claim upon it for the payment of their debts. The appellant was garnisheed at the suit of a creditor of the firm of Harrington and Sullivan. He appeared and answered, and being indebted to the defendants in that suit for this mineral, judgment was rendered against him as garnishee for the value thereof, and this judgment was paid. That certainly ought to be considered a sufficient answer to this action. It is true the appellant testified that there was an understanding between him and Sullivan and *Mrs. Sauntry*, that he was to pay the latter the value of one-half of this mineral. He supposed then he was getting a good title to Sullivan's share, and this was the consideration of that arrangement or understanding. But Sullivan having no authority to appropriate this partnership property to the payment of his own individual debt, and a creditor of the firm pursuing that property in the hands of the appellant, it is very clear that the consideration of the promise, or under-

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WEBSTER v. MODLIN et al. The judgment of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

WEBSTER VS. MODLIN, and another.

▲ judgment will not be reversed on account of the refusal of the court to grant a new trial, unless the refusal was excepted to.

Where the record does not show that such exception was taken, the affidavit of counsel will not be received to supply the defect, especially while the judge before whom the trial was had, is living.

ERROR to the Circuit Court for *Calumet* County.

This action was tried in November, 1854, and the defendants had a verdict. There was a motion for a new trial, which was denied by the court, and judgment entered against the plaintiff for costs. The record does not show that any exception was taken to the overruling of the motion for a new trial. The judge before whom the cause was tried having gone out of office before any bill of exceptions was settled, his affidavit stating what the evidence was upon the trial, was brought to this court in lieu of a bill of exceptions, but the affidavit does not show that any exception was taken to the order of the court denying the motion for a new trial. The counsel for the plaintiff in error produced his own affidavit, to supply that defect.

R. P. Eaton, for plaintiff in error.

E. S. Bragg, for defendants in error.

July 30. *By the Court*, PAINE, J. In this case the plaintiff in error seeks to use the affidavit of the judge before whom the cause was tried, in the place of a bill of exceptions, the judge having gone out of office before any bill of exceptions was set-

tled, and holding that he was not authorized to sign one afterwards. Without determining whether this is proper practice or not, we think the judgment must be affirmed; for the only error relied on is the refusal to grant a new trial, and the judge's affidavit does not show that any exception was taken.

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BELL.

The counsel for the plaintiff in error seeks to supply this defect by his own affidavit, showing that he did except. But certainly we shall not adopt the practice of trying the record upon affidavits of parties or counsel, while the judge before whom the trial was had, is living. If the affidavit of the judge can be received in place of a bill of exceptions at all, it must show that the necessary exceptions were taken.

The judgment is affirmed, with costs.

In the matter of the appeal of HUGH CAMPBELL, adm'r, &c.

When an administrator does not render an account of his administration to the probate court within one year from his appointment, nor apply to the court to extend the time for doing so, the court may cite him to render such account upon its own motion, and without the application of any one interested in the estate.

APPEAL from the Circuit Court for *La Fayette* County.

The case is stated in the opinion of the court.

T. J. Law, for appellant.

M. Hollister, contra.

By the Court, COLE, J. In this case the judge of the county court of *La Fayette* county, acting as judge of probate, made an order, citing the appellant, who was the administrator of the estate of Patrick Norris, deceased, to appear before him and render an account of his acts and doings as administrator, more than one year having elapsed since his appointment as administrator of such estate. From the order citing him to appear, &c., the administrator appealed to the circuit court, where the order of the probate court was affirmed. An appeal was then taken to this court.

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The simple question presented on the appeal, is, whether the probate court had authority, *upon its own motion*—no petition or application being presented therefor by some one interested in the estate—to make an order citing the administrator to render an account of his administration, after the expiration of a year from the time such administrator was appointed. It is contended on the part of the appellant, that the probate court can only make such an order upon the application of some one interested in the settlement of the estate.

Under the Revised Statutes of this state, courts of probate have a very extensive jurisdiction over the estates of deceased persons, and experience daily demonstrates that this jurisdiction must be extensive in order to secure a prompt and faithful settlement of such estates by those having them in charge. Our statute is founded upon the notion that the estates of deceased persons can ordinarily be settled within a year, and hence it is made one of the conditions of the bond to be given by an executor or administrator, that he “render a true and just account of his administration to the county court within one year, and at any other time when required by such court.” If the condition of an estate is such that it cannot be settled within the year, then the executor or administrator should apply to the probate court for an extension of time, to enable him to execute his trust. When the administrator does not ask to have the time extended for the settlement of an estate, we think the probate court has the power, after the expiration of the year, to cite the administrator to render his account, even upon its own motion, and we can conceive of no valid objection to such an exercise of power on the part of that court. It is suggested upon the brief of counsel for the appellant, that various causes might exist which would render it impossible for an administrator to properly settle an estate within a year; but when this is the case, an extension of time would undoubtedly be granted on application therefor. It is a notorious fact that great, and not unfrequently, unnecessary delay intervenes in the settlement of estates, and there is but little danger that the power which was exercised in this case, will be abused.

What reason the probate court had for citing the administrator to render his account in this case, we do not know. It is fair to assume that that court acted upon good and sufficient grounds in citing the administrator to render his account, and that ample time had been given for the settlement of the estate. The probate court may have known that the administrator was acting improvidently, and that it was improper that he should be allowed longer to remain in the exercise of his functions. There may have been infant heirs who had no guardian, or some other reason may have existed which rendered it expedient and necessary for that court to act as it did in the premises.

As we think the probate court had the power, under our statute, to make the order citing the administrator to account, it follows that the order of the circuit court must be affirmed.

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SMITH VS. PACKARD and others.

A judgment was rendered on the 14th of January, 1857, at which time the period of limitation of writs of error was four years from the date of the judgment. By an act approved April 24, 1859, the period of limitation was reduced to two years from the date of the judgment: *Held*, that a writ of error to reverse the above mentioned judgment, sued out on the 23th of October, 1859, was barred, a reasonable time for suing out the writ having elapsed after the passage of the last mentioned act, before the period of limitation prescribed therein expired.

ERROR to the Circuit Court for *Jackson County*.

The writ of error in this case was issued on the 28th day of October, 1859, to reverse a judgment rendered in the Jackson circuit court, on the 14th of January, 1857. A motion was made to quash the writ of error, upon the ground that it was barred by the statute of limitations.

Knapp, Widvey & Booth, for plaintiff in error.

J. J. Cole and W. H. Tucker, for defendants in error:

The statute of limitations in force at the time a suit is instituted, governs and limits the right of action. No vested right is interfered with by a change in the law in this re-

June Term, 1860. spect before the commencement of the suit. *Patterson vs. Gaines*, 6 How. (U. S.), 550; *Winston vs. McCormick*, 1 Ind., 56; 4 Cow., 392; 2 Paige, 284; Story on the Con., § 1379; *SMITH v. PACKARD et al.* *Buller vs. Palmer*, 1 Hill, 324; *People vs. Livingston*, 6 Wend., 526; 2 Ind., 486; 7 id., 91; 2 Shep., 344; 28 Miss., 361; 7 Met., 435; *Gilman vs. Cutts*, 3 Foster (N. H.), 382; *Willard vs. Harvey*, 4 id., 344; *Grover vs. Coon*, 1 Coms., 536; 7 Barb., 445.

July 30. *By the Court*, PAINE, J. At the time of the argument of this case, a motion to quash the writ of error was also argued, and the conclusion to which we have come upon that, renders it unnecessary to decide upon the merits of the case.

The motion is made for the reason that the writ was barred by the statute of limitations. The judgment was entered on the 14th day of January, 1857. The statute in force at that time allowed a writ of error to be brought at any time within four years after the judgment. But chapter 61 of the General Laws of 1858, which was approved April 24th of that year, contains the following provision: "The time within which a writ of error may be issued in any case, is hereby limited to two years from the date of the judgment rendered in the case in which the writ is taken." This writ of error was issued on the 28th day of October, 1859, more than two years after the date of entering the judgment. If the statute applies, it is clear, therefore, that the writ was barred.

The authorities seems fully to establish the rule that where mere inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged or modified by law, and that statutes of this character apply to such rights existing at the time of their passage, provided a reasonable time is left after the passage of the act, and before it would operate as a bar, for the party to exercise the right. *De Cordova vs. City of Galveston*, 4 Tex., 470; *Winston vs. McCormick*, 1 Carter (Ind.), 56; *Gilman vs. Cutts*, 3 Foster (N. H.), 376; *Willard vs. Harvey*, 4

id., 344; *Smith vs. Morrison*, 22 Pick., 430; *Butler vs. Palmer*, 1 Hill, 324.

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In this case, about nine months remained after the passage of the act, and before the expiration of the two years from the date of the judgment. There can be no doubt that this must be considered as a reasonable time within which the writ of error might have been sued out, and that the statute therefore operated as a bar to its being issued afterwards. We think the constitutional provision that the writ of error shall never be prohibited, has no application to the question. The object of that provision was to prevent parties from being deprived entirely of the right to this writ; not to prevent any limitation from ever being established upon the exercise of the right.

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The motion to quash is granted, with costs.

DUNBAR VS. HARNESBERGER.

The assignee of a note which was over-due and had been paid, cannot maintain an action upon it against the maker, although he took the assignment without notice of such payment.

Where a sheriff has an execution in his hands against the owner and holder of a note, the maker may pay to such sheriff the amount of the note, or so much thereof as may be necessary to satisfy the execution, and such payment is as valid, under Sec. 90, Chap. 184 of R. S. 1853, as if made directly to the holder of the note.

APPEAL from the Circuit Court for *Pierce County*.

Action by *Dunbar* against *Harnesberger*, before a police justice of the city of Prescott, on a promissory note, dated June 12th, 1858, due the last day of January, 1859, for fifty-five dollars, with twelve per cent. interest from date, executed by the defendant to Henry Sorns, and alleged to have been endorsed by said Sorns, and delivered to the plaintiff.

Answer, 1. A general denial. 2. Payment of the note after due, to L. H. Merrick, who was at that time the holder thereof. 3. Payment of the note to the sheriff of Pierce county, upon an execution in his hands issued out of the

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circuit court of that county, in favor of one L. D. Newell, and against said L. H. Merrick. The justice gave judgment against the defendant for \$31 40, with costs, from which he appealed to the circuit court.

On the trial in the circuit court, the plaintiff gave in evidence the note sued upon, which was as follows: "June the 12th, 1858, \$55 00. On or before the last day of January, 1859, for value received, I promise to pay Henry Sorns, or order, the sum of fifty-five dollars, with 12 per cent. interest from date until paid.—EPHRAIM HARNESBERGER." On the back were the following endorsements: "C. A. TABOR"—"Pay N. S. Dunbar, or order.—HENRY SORNS."

The defendant gave in evidence the judgment docket of the circuit court for Pierce county, containing the following entry: "Plaintiff, L. D. Newell, defendant, L. H. Merrick. Amount \$36 83. Transcript of justice's judgment. Docketed March 4th, 1858. Execution issued, May 3d, 1859." The execution upon this judgment, dated May 3d, 1859, and directed to the sheriff of said county, was read in evidence, and also the sheriff's receipt, which was as follows: "Circuit Court, Pierce county; L. D. Newell vs. L. H. Merrick: Received of Ephraim Harnesberger, thirty dollars, being balance in full for note made by Ephraim Harnesberger, payable to Henry Sorns, or order, for the sum of fifty-five dollars, dated the 11th day of June, 1858, due the last day of Jan. after date, drawing 12 per cent. interest per annum, now owned and held by L. H. Merrick, of the city of Prescott; said money to be applied on an execution held by me in favor of L. D. Newell, plaintiff, and against L. H. Merrick, the defendant. May 3d, 1859.—H. P. AMES, Sheriff of Pierce County." The defendant introduced evidence tending to show that at the time of said payment to the sheriff, L. H. Merrick was the owner and holder of said note.

The court instructed the jury "that the maker of a promissory note cannot set up the defence of payment to the note after maturity thereof, without showing that the subsequent indorsee had notice of such payment;" to which instruction, the defendant excepted.

The defendant asked the court to give the jury certain instructions, the terms of which are stated substantially in the opinion of this Court, but the circuit judge refused to give such instructions, the defendant excepting, and directed the jury to find a verdict for the plaintiff, which they did, in the sum of \$32,12. A motion for a new trial, on the ground that the court erred in the instruction so given, and in refusing the instructions asked by the defendant, was overruled, and judgment entered upon the verdict.

P. V. Wise, for appellant.

J. S. White & Jay, for respondent.

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By the Court, COLE, J. The principal question in this case is the one which arises upon the refusal of the circuit court to give the instructions asked for by the appellant. The court was asked to instruct the jury, that if they should find from the evidence, that the payment by the appellant to the sheriff, on the execution of L. D. Newell against L. H. Merrick, was made while Merrick was the holder and owner of the note sued upon, and before it came to the possession of the respondent, then he had a right to set off in the action, the amount thus paid by him to the sheriff. And further, if the jury should find from the evidence, that L. D. Newell, the plaintiff in the execution, had a subsisting judgment against L. H. Merrick, and that execution was issued on such judgment, and delivered to the sheriff, and that the defendant in the execution, Merrick, was the owner and holder of the note at the time the appellant paid the sheriff the amount which he owed on the note (the note being past due), that then they must find for the appellant."

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We can perceive no objection to these instructions, and think they were pertinent and proper to be given to the jury, under the facts of the case. It is obvious that the defense to the action was, that the note was paid while Merrick was the holder and owner thereof, and that it was transferred to the respondent after it was due, and subject to all equities. If, indeed, the respondent received the note when over due, and after it had been paid, it is clear he could not maintain the suit. It is true the instructions do not assume

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that Merrick himself, the then holder and owner of the note, received the money due upon it, but that the appellant discharged the note by paying the amount due upon it, to the sheriff, who had a valid execution against Merrick. And, we suppose, a payment to the sheriff under such circumstances, would be as complete and effectual a discharge of the note, under sec. 90, chap. 134, R. S., as though the money was actually paid to Merrick himself. For that section declares that "after the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid." The appellant claims to have paid the note under and by virtue of this provision of law, and the result must be the same as though the money was handed directly to Merrick, it being assumed that the note was past due, and belonged to Merrick at the time. Whether the note did in fact belong to Merrick at the time the money was paid to the sheriff, upon the execution against Merrick, was, of course, a proper subject to be determined by the jury upon the evidence. There was testimony tending to establish that fact, and hence the pertinency of the instructions asked for by the appellant, and refused by the circuit court.

The judgment of the circuit court is reversed, and a new trial ordered.

BURBANK VS. FRENCH and another.

In an action by the assignee of a note against the maker, averments that the defendant *made* the note, and that the payee *indorsed* it to the plaintiff, who is the lawful holder, and that the defendant is indebted to the plaintiff in the amount thereof, are sufficient, without any further allegation of the *delivery* of the note by the maker to the payee, or by the payee to the plaintiff.

APPEAL from the Circuit Court for *Crawford* County.
Action on a promissory note. Demurrer to the complaint,

on the ground that it did not state facts sufficient to constitute a cause of action. Judgment for plaintiff. The allegations of the complaint, and the objections made to it, are stated sufficiently in the opinion of the court.

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D. H. Johnson and *O. B. Thomas*, for appellants, in support of their objections to the complaint, cited *Parker vs. Totten*, 10 How. Pr. Rep., 233; 8 id., 491; *Lord vs. Cheesebrough*, 4 Sandf., 696; 6 id., 692; *Garvey vs. Fowler*, 4 id., 665.

Bull & King, contra, cited *Churchill vs. Gardner*, 7 T. R., 596; *Smith vs. McLure*, 5 East, 476; *Peels vs. Bratt*, 6 Barb. S. C. R., 862; *Russell vs. Whipple*, 2 Cow., 536; 2 Sandf. S. C. R., 673; *Voorhees* N. Y. Code, 169; *Chitty on Bills*, 538.

By the Court, COLE, J. The objection taken to the complaint in this case, that it does not state facts sufficient to constitute a cause of action, we deem untenable. It is insisted that the complaint is defective because it is not averred therein, that the note was ever delivered to the payee by the maker, or that the payee ever delivered it to the respondent. The allegation is, that the respondents, on the 29th day of January, 1858, made their promissory note in writing, whereby, sixty days after the date thereof, they jointly and severally promised to pay C. G. Baldwin or order, at the Bank of Prairie du Chien, the sum of \$150, for value received; and that the said payee thereof endorsed the said note to the plaintiff, and that the plaintiff is the lawful holder and owner of the said promissory note, and that the defendant is justly indebted to him therefor in the sum of \$150, principal, together with interest from, &c. It appears to us that, under the liberal system of pleading established by the Code, this complaint is sufficient. The allegation that the appellants made their promissory note, whereby, &c., they promised to pay the payee, for value received, and that the payee endorsed the same to the respondent, who is the lawful holder and owner thereof, and that the appellants are indebted to him therefor, is a sufficient averment of ownership and of title, without averring a delivery to the payee. For it is very clear that if the note was never delivered by the ma-

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kers to the payee, it is incorrect to say that they *made* their note whereby they promised to pay, &c., and that they are indebted to the indorsee thereon in the principal sum with interest. The *making* of a promissory note, in common parlance, implies doing every thing necessary to render it a valid instrument, while it would be a gross solecism to say a person was indebted upon a note which he never made and delivered. *Keteltas vs. Meyers*, 19 N. Y. R., 231; *Chappell vs. Bissell*, 10 How. P. R., 274; *Churchill vs. Gardner*, 7 Term Rep., 596; *Russell vs. Whipple*, 2 Cow., 536.

It is said that the allegation that the respondent is the "lawful holder and owner of the note," is but stating a legal conclusion. But the averment is, that the payee *indorsed* the note, a term of well known signification, implying, when used in such a connection, an assignment or transfer of title. It is further manifest that the allegation that "the defendant is justly indebted," &c., is a mere clerical mistake, unworthy of any serious attention. It is not probable that the appellants were, or could have been, misled, by the use of the singular instead of the plural number.

The judgment of the circuit court is affirmed.

NEWTON VS. ALLIS.

Where an action has been brought for damages for the *wrongful* erection and maintenance of a mill dam, and also for an injunction against the further maintenance of such dam, the plaintiff should not be allowed at the trial to amend his complaint, so as to make it conform to the provisions of the mill dam law, and proceed for the recovery of compensation under that law.

ERROR to the Circuit Court for *Fond du Lac* County.

The complaint in this case, which was filed in February, 1859, alleged the *wrongful* erection and maintenance by the defendant, of a mill dam, by means of which the plaintiff's land had been overflowed during six years next before the commencement of the suit, demanding judgment for \$5,000 damages, and also that the dam be abated and the defendant

be restrained from maintaining any dam by which the plaintiff's land should be overflowed. The answer was among other things that the dam was erected in 1848; that the defendant had always been ready and willing to make compensation for damages pursuant to the provisions of the statute in relation to mills and mill dams, but that no proceeding had been taken under that statute to obtain such compensation.

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On the trial the circuit court refused to receive any evidence of the damages sustained by the plaintiff on the ground that the action was improperly brought, and could not be sustained; to which ruling the plaintiff excepted. The plaintiff then asked leave to strike out of the complaint "so much of the prayer as sought greater relief than damages," which was refused by the court, and the plaintiff excepted. Judgment of nonsuit.

Edward M. Briggs, for plaintiff in error, contended that the mill dam law prescribed the substance of the complaint, but not its form, and that the complaint in this case was within its requirements. R. S., chap. 54, § 5; 11 Mass. 482. 2. The law applies only to streams "not navigable," and the defendant had introduced no evidence to show that the stream in question was of that character. Hence the judgment of nonsuit was granted prematurely. 3. The plaintiff ought to have damages for a period of time not covered by the mill dam law. A right of action for those damages existed at the time of the passage of the act of 1857.

J. M. Giller, for defendant in error:

The repeal of the mill dam law of 1849 did not affect the right of a party whose land had been injured by the erection and maintenance of a mill dam while the law remained, to relief under its provisions. *Stevens vs. Marshall*, 3 Chand., 222. The present action is not maintainable under the existing law; not even for damages resulting from a maintenance of the dam while no statute on the subject was in force. R. S., 1858, chap. 54, §§ 24, 25; *Fisher vs. Herrington Iron Co.*, 19 Wis., 351; *Thomas vs. Same*, decided at the last term of this court, but not reported.

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By the Court, PAINE, J. This suit was brought, obviously, as a common law action, for the flowing of the plaintiff's land by the erection of a mill dam. The judgment demanded was for damages, and a perpetual injunction against maintaining the dam. While the suit was pending, and after an answer had been put in by the defendant, setting up the mill dam law by way of defense, the decision of this court was announced, holding the mill dam law constitutional. The plaintiff then claimed that his complaint was sufficient as a proceeding under that law to recover his compensation, and asked leave to amend by striking out his prayer for an injunction, which the court refused.

The only question here presented is, whether he should have been allowed to go on with his action as a proceeding under the statute to recover compensation for the taking of his land. It may be that the facts averred in the complaint would be sufficient in a proceeding under the statute, but it is obvious that they were averred for an entirely different purpose. The theory of the common law action was, that the land had been wrongfully flowed, and that the plaintiff was entitled to damages therefor, and to prevent a continuation of the trespass, the equitable and legal relief being sought in one suit under the Code. The theory of the statutory proceeding is, that the land is lawfully taken for public use, and that the owner is entitled to his compensation. The one proceeding is different in its entire scope and object from the other, and they are founded upon entirely different rights. This being so, we do not think the party should be allowed to change the one into the other. He should stand or fall with the right which he made the foundation of his suit. Suppose a party should bring a suit to set aside a contract on the ground of fraud, and the defendant should set up a complete defense to the charge of fraud. If the complaint happened to contain sufficient facts to show a liability on the contract by the defendant, ought the plaintiff to be allowed to abandon the entire object of his suit, and take a judgment such as he might be entitled to under the contract? We think not. For that might have been a liability that the defendant never would have contested. And the same is

true here. If the plaintiff desires to proceed under the statute, he should commence for that purpose.

The judgment must be affirmed, with costs.

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WHITE.

LANE and another vs. WHITE.

Where property was offered for sale by a sheriff under a judgment of foreclosure, and struck off to a person who bid by the direction of the plaintiff's attorney, and who showed the sheriff a note from said attorney, stating that the bid was satisfactory to him, and that he would give a receipt to the sheriff for the amount: *Held*, That although the sheriff might have demanded his fees in advance, yet, not having done so, he had no right to disregard the bid, and proceed to re-sell the property, because such bidder was not prepared at the moment to pay his fees and disbursements.

APPEAL from the Circuit Court for *Fond du Lac* County.

This was an appeal from an order of confirmation of a sheriff's sale of land under a judgment of foreclosure. The objections made to the confirmation, are stated in the opinion of the court.

R. P. Eaton, for the appellants, contended that the sheriff was bound by his instructions as to the sale (2 Paige, 99; 3 id., 339; 11 Wend., 329-331); and having been duly informed that the plaintiffs were satisfied with the sale to Loomis, had no right to ignore that sale and re-sell at a sacrifice, before giving the plaintiffs' attorney notice, and time to pay his costs, 9 Paige, 259; 13 Wend., 226.

E. S. Bragg, *contra*.

By the Court, PAINE, J. We think the order of confirmation appealed from must be reversed. It appears from the affidavits that the property was struck off to one Loomis, who bid by the directions of the plaintiffs' attorney, and who gave a letter to the sheriff from the attorney, to the effect that this bid was satisfactory to the plaintiffs, and that they would receipt the debt to him thereon. But Loomis not being prepared to pay the amount of the sheriff's fees and

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disbursements in cash, the latter disregarded the bid, offered the property again for sale, and sold it for the exact amount of his fees and disbursements, being about one-third of the previous bid. This we think he had no right to do. The sheriff has no power to control the proceedings in executing a judgment, as against the solicitor of the plaintiff, merely for the sake of obtaining the immediate payment of his fees. He may demand his fees in advance, if he chooses, but if he does not do that, but proceeds to sell, and strikes off the property to a person bidding for the benefit of the plaintiff, he has no right, merely because such person is not prepared to pay his fees at the moment, to disregard the sale and sell the property over again. It is obvious that the interests of both the plaintiffs and defendants might be sacrificed, as they were here, by allowing the sheriff to take such a course.

The order must be reversed, with costs.

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SMITH and another vs. WOOD and others.

A bill for specific performance of a contract is addressed to the sound discretion of the court, and a contract, to be enforced, must be fair, just and certain, and founded on an adequate consideration, and if deficient in either of these requisites, a court of equity will not enforce it.

A and B entered, at the U. S. land office, forty acres of land, upon a part of which C and D had been mining and taking out lead ore, the two latter having also purchased of one E another part of said tract for \$2,500—neither C, D nor E having any right to said land or the ore therein. After A and B made their entry, C and D claimed the land, representing that their *diggings*, and the lot bought of E, were included within such entry; and A and B then executed their bond to convey the land to C and D upon obtaining a patent for it, if it should appear that the lot bought of E was situate thereon. The patent having been obtained, and it appearing that the lot purchased of E was situate upon the land, C and D filed a bill for a specific performance of the contract: *Held*, That the bond was without any consideration, and although under seal, could not be enforced.

APPEAL from the Circuit Court for *La Fayette* County.
Bill for specific performance of an agreement to convey land. The facts are stated in the opinion of the court. The

circuit court found for the plaintiffs, and made a decree accordingly.

James H. Knowlton, for appellants.

Mills & Barber, for respondents.

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By the Court, COLE, J. This was a bill in chancery, filed under the old practice, to enforce the specific performance of a bond for the conveyance of land. It appears that the case went to hearing upon the pleadings and bond, which is made an exhibit in the cause, and the circuit court decreed that the title to the forty acres in controversy be passed to, and become vested in, the respondents, under the provisions of our statute. But upon the facts disclosed in the case, we are unable to concur in this judgment.

It is well settled that a bill for the specific performance of a contract is an application addressed to the sound discretion of the court, which withholds or grants relief according to the circumstances of each case, and that a contract, to be enforced, must be fair, just and certain, and founded on an adequate consideration, and if deficient in either of these essential requisites, a performance will not be enforced. This is the common and uniform language of all the authorities upon this subject. 2 Story's Eq. Jur., §§ 751, 793 a, 793 b; Willard's Eq. Jur., pp. 266, 267; *Seymour vs. Delaney et al.*, 6 John. Ch. R., 222; *Minturn vs. Seymour*, 4 id., 497. We cannot see that the bond to convey in the present case was founded upon an adequate consideration. It appears that the respondents, in the spring of 1837, were engaged in mining upon a quarter section of land in La Fayette county, and had purchased, before that time, of one Jamison, for the sum of \$2,500, a lot upon said quarter section, known as the "Jamison lot," and were mining and taking out from said tract of land large quantities of mineral or lead ore, when the appellant *Wood*, and one Carlin, entered forty acres of the said quarter section, at the United States land office, and obtained a receiver's receipt of entry. The respondents, upon being informed of the entry by *Wood* and Carlin, procured affidavits establishing the fact of their occupancy and mining upon the land, and went to *Wood* and Carlin and

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made claim to the land entered by them, representing that their diggings and the "Jamison lot" were included within such entry, when *Wood* and *Carlin* executed a bond, in the penal sum of five hundred dollars, to convey to the respondents the forty acres, providing it should appear that the "Jamison lot" was upon said tract, and they should obtain a patent for the land from the United States. The respondents continued personally to work upon the land, and to lease it for mining purposes, until 1854, when they learned that a patent had issued to *Wood* and *Carlin*. In the meantime *Carlin* had died, leaving a widow, and adult and minor children, and *Wood* refused to convey his interest in the land. It appears that *Wood*, in fact, had sold and conveyed his interest in the land to one *Burrell*; but if he had not, under the case made out by the bill, a court of equity would not compel him to execute the bond voluntarily entered into.

The United States lead mines on the upper Mississippi were early reserved from sale, and, in pursuance of an act of congress, were leased for limited terms, by agents acting under the direction of the President. There was great opposition to the system among the miners, and many never applied for or received any leases from the general government, but went on to the public lands, made claims, worked upon them and sold the mineral discovered and taken from their diggings. These claims were generally respected by the miners, even in cases where there was no lease, and were a subject of bargain and sale among them. We infer that the respondents purchased one of these claims, paying therefor a large sum of money. But it seems this claim, or mineral lot, was embraced within a forty acre tract, which had not been reserved as mineral land, and therefore was subject to entry. Every one at all acquainted with the early history of the lead district of the territory of Wisconsin, well knows that many lands containing rich veins of mineral, were entered. These entries were valid, unless the general government saw fit to vacate them, and the purchaser acquired an absolute title. So there can be no doubt that *Wood* and *Carlin* obtained a good title to the tract entered by them. What obligation were they under to recognize any claim upon the

land thus entered? What legal or equitable right had the respondents to call upon them for a conveyance of this land? We cannot perceive that they had any whatever. And although *Wood* and *Carlin* gave a bond for a conveyance, yet as this was without consideration, why should a court of equity now enforce a specific performance of it? It is a voluntary agreement, and, although under seal, ought not to be enforced.

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The counsel for the respondents virtually conceded that the bill in this case did not set forth such a state of facts as showed that the bond ought to be specifically enforced, but he insisted that inasmuch as the trial was had, and the appeal taken, under the Code, we ought to presume that the proofs supplied the facts which the bill omitted to state. There is no proof in the case except the bond, and we do not feel authorized to presume that evidence was given on the trial which made out a case quite contrary to, or entirely inconsistent with, the allegations of the bill. The bill does not show that the bond was executed upon an adequate consideration, but the contrary.

It follows that the judgment of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

MOYER VS. GUNN.

Action on a usurious contract. Plea, payment of the principal sum loaned, and usury: *Held*, that the defendant, on proof of such payment, was entitled to the benefit of his plea of usury, under section 6, chapter 61, R. S. 1858.

A counter-claim, unless denied, is admitted.

The practice of proving by a witness the amount computed by him to be due upon a note, when the note itself is before the jury, who can determine for themselves whether the computation is correct or not, is referred to without disapproval.

APPEAL from the Circuit Court for *Pierce* County.

Action by *Moyer* as assignee of a note for \$1150, made by

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Gunn to one Manning, dated June 25th, 1857, payable six months after date, bearing 12 per cent. interest from date. Answer, usury, payment of the principal before suit brought, and a counter claim for \$8 30. There was no reply. Upon the trial the counsel for the plaintiff testified that he had computed the amount due upon the note, which he produced, and that there was due upon it, at that time, after deducting the credits indorsed thereon, the sum of \$171 76. The defendant objected to the testimony of this witness, and his objection being overruled, excepted. Manning, the payee of the note, and *Gunn* (who was sworn in his own behalf, pursuant to notice), testified that the consideration of the note in suit was \$1000, and no more, and that the residue of the sum expressed in the note was added for the forbearance of said \$1000, for six months, in addition to the 12 per cent. interest reserved by the terms of the note. *Gunn* also testified that he had paid the plaintiff \$1000 on the note before the commencement of the suit, and that the plaintiff was indebted to him in the sum of \$8 30, for lumber sold and delivered.

The counsel for the plaintiff thereupon moved the court to strike out all the evidence adduced on the part of the defense, on the ground that it was incompetent, which motion the court sustained, and ruled that the evidence be stricken out and withheld from the jury, and the defendant's counsel excepted.

The court then instructed the jury as follows: "1. That said testimony could not have any weight or force to entitle the defendant to a verdict, or to bar the plaintiff of his action, for the reason that the defendant's answer did not allege a tender of the principal sum loaned, on the day it became due. 2. That proof by the defendant of the usurious contract and payment of the principal sum loaned, is not sufficient to entitle him to a verdict, because payment does not comply with the statute requiring a tender of the principal sum loaned, before pleading usury. 3. That they would find in this case a verdict for the plaintiff for the sum of \$171 76, with interest from the 24th day of May, 1858." The defendant excepted to each of said instructions. Ver-

dict for \$183 46, and judgment against the defendant on the verdict.

J. S. White and *P. V. Wise*, for appellant.

Hill & White, for respondent.

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By the Court, COLE, J. As we understand the facts of this case, the note sued upon was produced and offered in evidence on the trial, and the witness Hill only testified to having computed the amount due upon it, over and above the indorsements. But the note itself was before the jury, who could determine for themselves whether that computation was correct or not.

But we do not understand upon what ground the circuit court withheld from the jury the evidence of the appellant. It appears that notice of his intended examination in his own behalf was given to the opposite party, and there does not appear to have been any objection taken that this notice was not reasonable and sufficient. He was a competent witness under the statute (chap. 137, R. S.), and his testimony went directly to sustain the defense of usury set up in the answer. We can see no reason for excluding it from the consideration of the jury. We infer from the charge, that the circuit court supposed this evidence to be inadmissible under the answer, and that it should be stricken from the case, for the reason that the appellant had not alleged in his answer that a tender was made of the principal sum loaned, on the day it became due. We have, however, held in several cases, that where any person set up usury in an action against him, under section 6, chap. 61, R. S., it was not necessary for him to aver in his answer a tender of the principal sum loaned, but that he would be entitled to the benefit of his defense by proving such tender at any time up to, or even by making the tender upon, the trial (*Platt vs. Robinson*; *The Rock River Bank vs. Sherwood*, and other cases unreported). This is sufficient to show the error the circuit court fell into, in supposing that a tender of the principal sum should be alleged to have been made on the day the note became due. But there was a still further decisive answer to the view taken by the circuit court of this question of practice, and of the

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admissibility of the appellant's testimony. The appellant set up in his answer, and proved by his own testimony on the trial, payment of the principal sum loaned. This would seem to meet and fully overcome the objection which even the circuit court conceived existed to the pleadings, and the competency of this evidence under them. For surely if a party avers and proves payment of the sum loaned, the equity of his case is quite as strong as it would be to prove a tender merely. This appears quite too obvious to need comment. We, therefore, think the circuit court erred in excluding from the consideration of the jury the testimony of the appellant, as well as in its general charge as to the necessity of alleging a tender on the day the sum loaned became due.

There can be no doubt but the appellant was entitled to credit for the amount of the counter claim set up in the answer. He claimed that the respondent was indebted to him in the sum of \$8 30, for lumber sold and delivered before the commencement of the suit, and there was no denial of this part of the answer.

The judgment of the circuit court is reversed, and a new trial awarded.

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A deed need not show on its face the limits or quantity of the real estate granted, if it refers to certain known objects by which such limits may be readily ascertained.

Where a deed described the land conveyed therein, as "a part of the east half of the southwest quarter of section 5, town 3, range 8, beginning on the south line of said section 5, on the east side of the bottom land of the creek, *far enough up the bank to raise a nine foot head to a mill standing by the bridge on section 8, thence up the bottom land one hundred rods, to include all the bottom land on both sides of the creek, within the above mentioned bounds:*" *Held*, that the deed conveyed the bottom lands on each side of the creek for the distance of one hundred rods up the same from the place of beginning, which would be flowed by a nine foot head of water at the mill therein referred to, but did not grant a right to flow any lands of the grantor lying beyond the distance of one hundred rods in that direction, although such lands would be flowed by a nine foot head of water at the mill.

APPEAL from the Circuit Court for *Green* County.

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This was an action to recover damages under the mill dam law. The complaint shows that the plaintiff, in 1856, conveyed certain lands to the defendants *J. L. & S. C. Taft*, by the following description: "part of the east half of the S.W. qr. of section 5, town 3, range 8, beginning on the south line of said section 5, on the east side of the bottom land of the creek, far enough up the bank to raise a nine foot head to a mill standing by the bridge on section 8, thence up the bottom land one hundred rods, to include all the bottom land on both sides of the creek within the above mentioned bounds;" and alleges that the dam maintained by said defendants has caused the water of said stream to overflow certain land of the plaintiff, lying above the distance of one hundred rods up the creek from the south line of said section, for which injury the plaintiff claims compensation, according to the statute in such case provided.

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The defendants *J. L. & S. C. Taft* demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. "1st. It appears upon the face of the complaint, that the plaintiff sold and conveyed to these defendants a part of the land in the complaint first described, and enough so that they, the defendants, could raise by a dam a nine foot head of water for their mill in said complaint mentioned; but it is not alleged that a greater head, or even so great a head of water as nine feet, is or has been raised or maintained. 2d. It is not alleged in the complaint that the defendants have, by the erection and maintenance of said dam, overflowed any lands belonging to the plaintiff, which they have not a right to overflow, by virtue of said deed from the plaintiff to the defendants."

The demurrer was overruled by the circuit court, and the defendants appealed.

Gardner & West, for appellants. [No argument on file.]

Bingham & Bryant, for respondent:

The terms of the conveyance to the defendants, as set forth in the complaint, show no contract whatever in regard to the land for injury to which the plaintiff complains. To presume that the conveyance was intended to convey all the

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land on the east half of the S. W. qr. of section 5, that a nine foot head at the dam would cause the water to cover, is to presume far more than the language of the complaint describing the land thus conveyed, will warrant. If such was the intention of the parties to the conveyance, the defendants must show it by way of defense. If the parties supposed, at the sale, that a nine foot head at the dam would not cause the water to flow up more than 100 rods from the south line of the section, and the defendants claim the advantage of such mistake in calculation, they must show the mistake. The complaint, taken as true, shows that the plaintiff is entitled to compensation for the injury to his land.

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By the Court, DIXON, C. J. According to the maxim *id certum est quod reddi certum potest*, there is no doubt or uncertainty about the extent, quantity, or boundaries of the tract of land which the plaintiff, in the complaint, alleges that he has heretofore conveyed to the defendants *John L. and Suction C. Taft*. The complaint alleges that the land conveyed is described in the deed "as a part of the east half of the southwest quarter of section five (5), town three (3), range eight (8), beginning on the south line of said section five (5), on the east side of the bottom land of the creek, far enough up the bank to raise a nine foot head to a mill standing by the bridge on section eight, thence up the bottom land one hundred rods, to include all the bottom land on both sides of the creek within the above mentioned bounds, be the same more or less." It appears from the complaint that there is a creek, known as a branch of Sugar river, running through the half quarter section mentioned, and that it passes thence through a portion of the adjoining section eight, and that near by, on section eight, there is a mill site, upon which the defendants *Tafts* have erected a dam and put in operation a mill. It seems very evident to us, that the several matters which are thus alleged to be contained in the deed, are matters of description merely, used by the parties for the purpose of ascertaining the location, extent and boundaries of the land conveyed; and that, when construed with reference to these well known external facts and circumstances, the deed is

neither obscure nor ambiguous. We do not understand the law to require that a deed should, on its face, ascertain the limits or quantity of the estate granted, or the particular property conveyed; but that it will be sufficient if it refers to certain known objects or things, and provides definite means by which the same may be readily ascertained and known. Thus, in the case of *Owen vs. Thomas*, 3 Mylne & Keene, 353, an agreement in writing for the sale of a house, which did not, by description, ascertain the particular house, but referred to the deeds as being in the possession of a certain person named in the agreement, was held sufficiently certain, inasmuch as it appeared on the face of the agreement that the house referred to was that of which the deeds were in the possession of the person named, and consequently might be easily ascertained before the master. In this case, the several expressions of the deed concerning the land must be regarded as descriptive, and were introduced for the purpose of identifying the land and defining its limits and quantity. This is as true of the phrase "beginning on the south line of said section five, far enough up the bank to raise a nine foot head to a mill standing by the bridge on section eight," as of any other of them. The idea was to get at, and state on the face of the deed, some fixed and definite starting point in the boundary of the land conveyed. The line of the section, the creek, the bank, the bridge and the mill, were contiguous, well known objects, by means of which, and of a measurement for a nine foot head of water, this point could be readily ascertained. This method of arriving at and stating it, rendered the point as definite and certain as it would have been if the measurement had first been made, and the place marked by a monument mentioned in the deed. This point being established, the residue of the description seems perspicuous enough. The evident intention was to convey all the low lands on either side of the creek, for the distance of one hundred rods up the same from the place of beginning, which would be flowed by such a head of water. The parties undoubtedly contemplated a raising of the waters of the creek to this height. This, when done, would constitute the water's edge the bounds of the

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land on each side of the creek. But, whether they contemplated this or not, the deed would not on that account be void, for the reason that the boundaries, or what would have been the water's edge, were capable of ascertainment by other means. Construing the deed most strongly against the grantor, the one hundred rods would be measured from the point of commencement, in a straight line to, and terminating at, the real or imaginary water's edge at that distance up the stream. Thence it would be bounded by a straight line drawn parallel with the south line of section five, to the same real or ideal boundary on the opposite side of the creek, down which it would proceed to the point of intersection with the line of the section, and thence by the section line to the place of beginning. This, it appears to us, was the manifest meaning and intention of the parties, to be gathered from the language used. Believing as we do, that the language about the "nine foot head" was introduced for the purpose of description merely, it, of course, repels any presumption, at this stage of the action, that it was intended or used for the purpose of granting to the defendants any right to flow the lands of the plaintiff above the distance of one hundred rods, as specified in the deed.

The order of the circuit court overruling the demurrer, must therefore be affirmed, with costs.

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Where, in an action by the vendee of goods against creditors of the vendor, who had seized the goods under writs of attachment, as the vendor's property, evidence had been given of facts tending to show that the sale was fraudulent as to creditors, an instruction to the jury that such facts, if proven, "were evidence of fraudulent intent," was liable to be understood by the jury as meaning that such facts, if proven, were *sufficient* evidence of such intent, and was, therefore, calculated to mislead them.

An instruction to a jury, "that the terms of a sale [which was partly on a credit of one and two years] were in part calculated to hinder and delay creditors; that the law presumes a man to intend that which must naturally be the consequence of his acts; and that if they were satisfied that at the time of the

sale the vendee had knowledge of the insolvency of the vendor, then his purchase was fraudulent as against such creditors," was erroneous, because it was liable to be understood as declaring that the vendee must be presumed to have intended to delay the creditors of the vendor, if such was the effect of his purchase, although it should not appear that he knew that the vendor was insolvent; and because the facts referred to in the instruction, although indicative of a fraudulent intent, should have been submitted to the jury, to be considered by them, in connection with all the other evidence, in determining the intent of the parties.

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Evidence tending to establish fraud, must be submitted to a jury in such a manner as leaves them free to determine its effect.

The acts and statement of a vendor, before and at the time of the sale, are admissible in evidence to show his fraudulent intent.

The intent of the vendor of goods to hinder and delay his creditors, does not affect the title of the vendee, without proof that he had notice of that intent.

Where a sale of goods is sought to be impeached as fraudulent against the creditors of the vendor, facts tending to show that the vendor procured the goods from such creditors by false representations, with an intention to defraud them, and that his vendee was aware of, and had participated in, that fraudulent purpose, are admissible as circumstances from which, in connection with other evidence, the jury may infer that such sale was made in execution of the previous fraudulent design.

Where the vendee, before the creditors sued out their writs of attachment, offered to transfer the goods to them, if they would release him from his liabilities for debts incurred by the vendor in the purchase of the goods (such liabilities being much less than the nominal price which he had agreed to pay for the goods), evidence of such offer was properly ruled out, as not tending to establish the good faith of the sale.

ERROR to the Circuit Court for *Fond du Lac* County.

Trespass, by *Timothy L. Gillet* against *Phelps, Vedder* and *Van Buren*, for taking a stock of goods. The defendants pleaded severally the general issue, with a notice of justification, which alleged that said stock of goods was taken as the property of one *George W. Gillet*, under several writs of attachment, issued at the suits of several firms which were creditors of said *George W.*, and of which firms the defendants were members, and that said goods were, at the time of such taking, the property of said *George*, and not of said *Timothy*, who claimed the same under a sale from said *George*, which was fraudulent as to creditors.

On the trial, the plaintiff proved his purchase of the goods from said *George W. Gillet*, on the first day of November, 1853, at a price exceeding \$7,000, which was the full value

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thereof; his continued possession until the 17th day of December of the same year; the taking of the goods on that day by the sheriff, under the writs of attachment above referred to; their removal and subsequent sale by the officer, and the fact that, in such taking, the sheriff acted under the direction of the defendants. There was also evidence tending to show a concert of action among the defendants in suing out the writs of attachment, and in the proceedings thereon.

The plaintiff's witnesses also testified, that he paid for the goods at the time of the purchase, by assuming a part of the indebtedness of George W. Gillet for the same, to the amount of about \$2,800; by paying in cash, for said George, \$118; by executing to him promissory notes for the aggregate sum of \$2,800 or \$2,900, mostly payable in from one to two years, with interest after six months, and by conveying to said George certain lands, and transferring to him several real estate and chattel mortgages; and that the indebtedness thus assumed, the mortgage debts thus assigned, and most of the notes thus given, had been paid.

The defendants introduced evidence of acts and statements of George W. Gillet, tending to show that he was insolvent at the time of the sale of said goods, and that the sale was made with the design on his part of hindering and defrauding his creditors; to which evidence the plaintiff's counsel objected, on the ground that it was not shown, or offered to be shown, that the plaintiff was cognizant of the facts; but the objection was overruled, and the plaintiff excepted.

The defendants also called as a witness, one Fenton, of the firm of Fenton & Phelps, New York, who testified to certain representations made to said firm in the city of New York, in May, 1853, by George W. Gillet, to induce the said firm to sell him goods. His testimony was as follows: "He [George W. Gillet] represented that, by the wish of his uncle, [the plaintiff] he was going to Fond du Lac; that his uncle offered him some inducements; had a store he would rent him cheap, and would assist him; that he had also an authority from the plaintiff to draw on him for \$1,500, at six months, which would be paid when due, and would be capi-

tal in his business; that he should not have to provide for it himself; that before he came to New York again, his uncle would be partner in the business; that his uncle had promised to be a partner; that his uncle was worth \$25,000; that he should be prepared to pay before he sought to buy again, although it would not be due; that his business would warrant it. I sold him goods on the faith of these representations. I next saw him in August or September following. I saw him alone. He proposed to buy goods. I asked him if he was prepared to pay. He replied he was not; that he had not thought it necessary; that his situation was such he thought I would not require it; besides, that the bill was not due. I then asked him if he had formed the partnership with his uncle. He said he had not; that his uncle was then in New York; was going into the banking business; and could render him more assistance in that capacity than to be a known partner in his business. I told him I would not be satisfied to sell him more goods, while he owed me so much money. He said his business had been prosperous and he had made money, and he would have no difficulty in meeting his payments; that he would bring his uncle in and introduce him, and he had no doubt that, after an interview, I would sell him more goods. The same day, or the next day, he brought his uncle into the store and introduced him. I related in their presence all the conversation I had had, as to his means, copartnership, &c., and plaintiff assented to it. He said it was all right; that George was doing well, and any goods that he bought would be paid for. I don't recollect that he said anything about copartnership. He assented generally, and said that he could be of more service as banker than as partner. I declined to sell. Plaintiff said George was responsible, and the payments would be promptly met. He said his letter of credit would be promptly paid when due. The acceptance and bill of goods, I believe, both fell due in November. I did not sell him any more goods. I don't know of any other purchases made by George at that time on credit. I heard him say he was buying of Wagstaff & Vedder about \$1,600, and of Davis, Byrne & Johnson \$600 or \$700, and that the whole amount of his purchases

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was \$11,000 or \$12,000. The acceptance of the plaintiff was not paid at maturity." To all this testimony the plaintiff's counsel objected, but the objections were overruled, and the plaintiff excepted. On cross-examination, the witness said: "I sold George partly on his letter of credit, and partly on the statement as to his ability to pay. I never sold him any goods on the plaintiff's representations. All the goods were sold prior to my acquaintance with the plaintiff. Plaintiff did not tell me he was going in as a partner, nor that the letter of credit was going in as capital."

One Ogden, a witness for the defendants, also testified as follows: "I was at Fond du Lac on the last days of October and first of November, 1853; am an attorney at law; had a claim against George W. Gillet; called on him on Saturday; saw plaintiff in the store; George occupied plaintiff's store; George said he was doing a good business, and would in a short time be able to pay the claims I had against him; plaintiff was in the store at that time; had another conversation the same day; left for home Tuesday; spoke with the plaintiff about a letter of credit for \$1000 he had given George; he knew my business, and that I was pressing George; George offered me plaintiff's notes, which I refused, without a mortgage; George said he would not give a mortgage, but still offered notes, which I refused, and said I would go home and sue. At one conversation plaintiff was in hearing, but can't say as to the other times."

There was also evidence tending to show that at the time of Ogden's interview with the plaintiff and George W. Gillet, the sale of the goods to the former had been the subject of negotiation, and that the invoice and other papers relating thereto were then being made.

The plaintiff re-called James M. Gillet, one of his witnesses, and asked the following questions: "State whether, prior to the attachment, you had any conversation with Phelps & Vedder, with reference to the fairness of the sale on the part of the plaintiff. If so, state what they said." Objection by defendant sustained, and plaintiff excepted. Question. "What offer, if any, did the plaintiff then make to the defendant Vedder to transfer this stock of goods to

him, provided he would relieve him from his liabilities for George W. Gillet?" Objection by defendant sustained, and plaintiff excepted. The same question was repeated with a substitution of "the defendant *Phelps*" for "the defendant *Vedder*," and was ruled out, and the plaintiff excepted.

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The court, among other things, instructed the jury as follows: "That if they believed that G. W. Gillet made the representations to Ogden, sworn to by him, on the 29th and 31st days of October, 1853, and that the plaintiff was present and heard the same, and sanctioned the same, or did not dissent therefrom, and that, in fact, the sale to the plaintiff had then been negotiated, and that an invoice was being taken, and the deed of the lots made, the same evening that Ogden last called—it is evidence of fraudulent intent on the part of the plaintiff."

The court further instructed the jury as follows: "That the terms and conditions of the sale were directly, in part, calculated to hinder and delay creditors, and the law presumes that a man intends that which must naturally be the consequence of his acts; and if the jury are satisfied that, at the time of said sale, the plaintiff had knowledge of the insolvency of George W., then he was a fraudulent purchaser of said goods, as against the creditors who attached said goods." To all these instructions the plaintiff excepted.

Verdict for defendants. Motion for a new trial denied, exception taken, and judgment on the verdict.

Ed. S. Bragg, for plaintiff in error:

1. Evidence of the insolvency of the vendor was admitted, although there was no proof or offer of proof at the time, to charge the plaintiff with knowledge of such insolvency. This is cause for reversal. 2 Hill, 447; 19 Wend., 232; 16 id., 64; 2 Hall, S. C., 42. 2. The declarations of Geo. W. Gillet, sworn to by Fenton, were inadmissible, because they were "the declarations of a third person, not a party to the suit, and who was himself a competent witness." *Persons vs. Burdick*, 6 Wis., 63; and because the defendants had affirmed the contract made with plaintiff's vendor, by bringing suit upon it, and were thereby estopped from alleging fraud in that contract, to vitiate the title of third parties. 1 Doug.

June Term, 1860. (Mich.), 330; 24 Wend., 86; 1 Denio, 69; 13 Barb. (S. C.), 641. 3. The court erred in ruling out the questions put to Jas. M. Gillet. It erred, also, in its charge to the jury, in stating, as matter of law, that certain facts were "evidence of a fraudulent intent" (1 Chand., 40; 3 id., 240), and in assuming that the plaintiff's vendor was insolvent, both of which were questions of fact for the jury; and in holding that a man who hears a false statement of his debtor to a rival creditor without dissent, is guilty of a fraud, which vitiates securities for his own debt, then being perfected.

Chas. A. Eldredge, for defendants in error:

1. There was no evidence to establish a *joint* trespass, and therefore the action must fail. 2. The acts and declarations of plaintiff's vendor were admissible to show that the sale was made with an intention, on his part, to defraud his creditors. The testimony of Fenton shows that the false representations of George, in the purchase of the goods, were adopted by the plaintiff, and connects him with the fraudulent design in that purchase, which was consummated in the sale to himself. Their declarations give character to their acts, and show them to be *participes criminis*. *Crary vs. Sprague*, 12 Wend., 41; *Waterbury vs. Sturtevant*, 18 Wend., 359; *Apthorp vs. Comstock*, 2 Paige, 488; 1 Greenl. Ev., p. 136; 12 Vt. R., 519. 3. The acts and representations referred to in the first instruction, to which exception was taken, were "evidence of a fraudulent intent," although not *conclusive evidence* (Roberts on Fraud. Con., 569); and the terms of the sale manifestly tended to hinder and defraud creditors, as stated in the second instruction.

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By the Court, PAINE, J. We think that the judgment in this case must be reversed, for the reason that the instructions given by the court to the jury were calculated to mislead them, and might have prejudiced the rights of the plaintiff. The question was, whether the sale from George W. Gillet to the plaintiff was fraudulent. The first instruction appearing in the bill of exceptions, is as follows: "That if they believed that G. W. Gillet made the representations to Ogden, sworn to by him, on the 29th and 31st days of

October, 1853, and that the plaintiff was present and heard the same, and sanctioned the same, or did not dissent therefrom, and that in fact the sale to the plaintiff had been then negotiated, and that an invoice was being taken and the deed of the lots made out the same evening that Ogden last called, *it is evidence of fraudulent intent on the part of the plaintiff.*"

Now we think this language is not only capable of being so construed, but would be commonly understood as meaning, not merely that the facts mentioned would be competent evidence, proper to be considered in determining the question of fraud, but would be full evidence of the fraudulent intent of the plaintiff, and such as would require them to find it as a fact. Most juries would so understand it. If the judge tells them that certain facts are evidence of another, they would understand it to mean sufficient evidence, and not merely material and tending to establish the other. Lawyers, acquainted with the rules of evidence and the different functions of the court and jury, might infer only the latter meaning. But we think a jury would naturally infer the former, and that for this reason the instruction may have prejudiced the rights of the plaintiff. For the effect of this evidence was for the jury and not the court to determine, and it should have been submitted to them in such a manner as left them free to determine it, and not in language implying that they were bound to give it a particular effect.

The judge gave also the following instruction, which was excepted to: "That the terms and conditions of the sale were directly in part calculated to hinder and delay creditors, and the law presumes a man intends that which must naturally result from his acts; and if the jury are satisfied that at the time of said sale, the plaintiff had knowledge of the insolvency of George W., then he was a fraudulent purchaser of said goods, as against the creditors who attached said goods."

We think this instruction is also liable to objection. It assumes things which should have been left to the jury, and only in connection with which assumption could the instruction be sustained. For certainly it will not do to say that the law presumes that every man who sells on credit and takes notes, does so with intent to hinder and delay his cred-

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itors. If the property sold is all that he has, or if he is insolvent, then such terms of sale may indicate that intent, and they should be submitted to the jury in connection with the evidence upon the other points, as all to be considered in determining upon the intent of the parties.

There is another point of view in which the instruction may have prejudiced the plaintiff. The terms of the sale are agreed on by both the parties; it is the act of both parties. When the court, therefore, told the jury that the direct effect of it was in part to hinder and delay creditors, and that the law presumed that a man intended that which naturally resulted from his acts, they might apply it as well to the purchaser as to the vendor, and suppose that the law presumed that the purchaser intended to delay the vendor's creditors, because such was the effect of the terms of sale. It is obvious, however, that this principle could apply only to one having knowledge of the condition of the vendor's indebtedness. He himself must of course know it, and if he made a sale upon such terms as must hinder his creditors, he may be presumed to have had that intent. But it would not do to presume that the purchaser had that intent, because such was the result of his purchase, unless he knew that the vendor was so indebted as to produce such a result. It may be that the court intended this general language to apply only to the question of the vendor's intent, and that it was qualified with respect to the plaintiff, by the subsequent statement that "if he knew of the insolvency of George W. then he was a fraudulent purchaser," &c. If so, it would not be liable to this objection; but we think the distinction between the intent of the vendor and that of the purchaser should be more clearly marked in a case of this kind: for whatever may have been the facts in this case, it is undoubtedly true that the rights of purchasers frequently depend entirely upon the observance of that distinction.

We have no doubt of the admissibility of the acts and statements of George W. Gillet, which were offered for the purpose of showing his fraudulent intention. Whenever the intent of any man, in doing a particular act, is in question, his statements and acts with reference to it, at the time,

and certainly those preceding the time, are original evidence for the purpose of showing his intent. The authorities cited by the defendant in error, fully establish this proposition. And it results from the necessity of the case, as there is no other mode of proving intention. It stands upon the same grounds with the question of the bodily or mental feelings or sanity of any person. Greenleaf's Ev., vol 1, §§ 102, 110.

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Nor do we think there was any error in admitting the evidence of Fenton as to the statements of the plaintiff in New York, in relation to the previous representations of George W. Gillet, at the time he purchased the goods. The counsel for the plaintiff in error urged that those statements, made long after the sale, could not possibly have induced the sale. That is very true, and would have been a good answer to an action against the plaintiff for falsely representing George W. to be responsible. Yet, although these statements could not have induced the sale to George W., yet if that sale was induced by the same and other false representations, made by George W. himself, for the purpose of obtaining the goods and then defrauding his creditors, and these subsequent statements by the plaintiff were sufficient to satisfy the jury that he was aware of and participated in the original purpose of George W., that would strongly tend to impeach the good faith of the sale from George W. to him, and go to show that it was simply an execution of the original design. The statements were not offered to show that they induced the sale to George W., but to show, in connection with other evidence, a fraudulent design on his part in procuring the goods, which was aided by the plaintiff, as circumstances from which the jury might infer a continuation of the fraudulent intent, and knowledge of and participation in it by the plaintiff. We have no doubt it was competent evidence for this purpose.

Nor do we think there was error in rejecting the evidence of the plaintiff's offers to transfer the property to the defendants, if they would relieve him from his liabilities for George W. Gillet for the goods. We should doubt the tendency of such an offer, even if shown, to establish the good faith of the sale. For if it had been made in good

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faith, and the plaintiff had paid divers other valuable considerations in addition to his "liabilities for George W. for the goods," it is not according to the ordinary action of human nature, that he should transfer the whole stock, merely in consideration of being relieved from those liabilities. But such an offer seems to be more in the nature of a wager of a man's present good faith, than as having any real bearing upon the question, whether he previously had knowledge of a fraudulent intent on the part of his vendor.

But we are inclined to think that the evidence of the statements of *Phelps* and *Vedder*, with respect to the fairness of the sale, were admissible. It was said that these statements were made immediately after the transaction, and when they were ignorant of the evidences of fraud, and that they may have assented to the fairness of the sale from motives of policy, &c. This may all be very true, and might be urged before the jury in such manner as to destroy the effect of the evidence. But it goes to its effect, not to its admissibility. The admission that a sale was fair is rather the admission of a general conclusion, than of any distinct fact. Yet we are unable to take it out of the general rule which admits the statements of parties with reference to the transactions in question between them. Of course their admissions would not affect the rights of the other defendants, but would be evidence only as against themselves.

There was some evidence tending to show that the defendants were acting in concert in attaching the goods. If that was so, which was for the jury to say, we think they were jointly liable, if liable at all, although their debts were separate.

The judgment is reversed, with costs, and a new trial awarded.

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A party to an action cannot recover fees for his own attendance and mileage, as a witness therein in his own behalf.

APPEAL from the Circuit Court for *Jackson County*.

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At the trial of this cause the plaintiff was nonsuited. The clerk, in taxing the defendants' costs, disallowed certain fees claimed by them, for travel and attendance as witnesses on their own behalf. On appeal from this taxation, the court directed the costs to be taxed as claimed by the defendants, from which decision the plaintiff appealed.

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W. H. Tucker, for appellant.

By the Court, PAINE, J. Since this appeal was taken, the defendant *Wm. Denison* has died. No steps have been taken to make his administrator a party to the suit, and it was suggested that no administrator had been appointed. Sec. 4, chap. 135, R. S., 1858, provides that on the death of any of several defendants or plaintiffs, where the cause of action survives, it shall be prosecuted by the surviving plaintiffs or against the surviving defendants, as the case may be. We shall not attempt to determine what effect should be given to this section, as there was no argument upon the question, and no appearance here by any of the defendants.

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The only question presented on the appeal is, as to the right of parties who swear in their own behalf under the statute, to tax their fees as witnesses in their own favor. And we think they have not such right. The statute allowing parties so to swear, makes a radical change in the law in that respect, and however beneficial it may be in the provisions which it makes, yet we do not think any effect should be given to it beyond what its provisions require. It does not provide that parties swearing in their own behalf may tax fees for themselves as witnesses. And it is obvious that there is a clear distinction between them and other witnesses in this respect. For where the party is obliged to procure the attendance of another witness, the law presumes that he has to pay him the legal fees, as he cannot compel his attendance without. But the party generally attends at the trial of his own case for other purposes besides that of being a witness. And although the law has allowed him to swear in his own behalf, that does not indicate an intention on the part of the legislature to place him on the same footing with

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an ordinary witness in all respects, and allow him to tax his mileage and *per diem* for traveling to, and attending upon, the trial of his own case. If this right were allowed, we think, without some statutory provisions regulating it more perfectly, it would be liable to frequent abuse.

We are therefore of the opinion that the clerk was right in rejecting those items, and that the circuit court erred in allowing them. For these reasons, the order appealed from is reversed, with costs, and the cause remanded, though we make no decision as to the effect of this judgment upon the rights of the representatives of the deceased defendant.

GREEN, by her next friend, vs. LYNDES.

A married woman whose husband has deserted her and ceased to support his family, and has left the state without any intention to return, cannot maintain an action to set aside an assignment, made by her husband, of a school land certificate, and to have the certificate delivered up to her by the assignee, on the ground that the assignment was procured fraudulently, for a grossly inadequate consideration, when the assignor was intoxicated and unfit to transact business, nor on the ground that the land embraced in the certificate was, at the time of the assignment, occupied by the husband and his family as a homestead, and that she refused to become a party to the assignment.

If the assignment, in such case, is void, the wife can maintain possession of the homestead against the holder of the certificate.

APPEAL from the Circuit Court for *La Crosse* County.

This action was brought in July, 1859, by *Abigail Green*, a married woman, by her next friend, to have an assignment by her husband of certain school land certificates set aside, and the certificates delivered up to her. The facts averred in the complaint are as follows: The plaintiff was married to Henry H. Green in 1832, and they lived together as husband and wife until May, 1859. In June, 1852, the said Henry became the owner of four school land certificates, embracing the S. W. qr. of Sec. 3, T. 16 N., R. 7 W., in *La Crosse* county, and continued to pay all moneys becoming

due from time to time on the certificates, according to law. Said Henry and the plaintiff, with their children, entered upon the lands about the time of the purchase, and made valuable improvements thereon, including a dwelling house, barn, &c., erected on the S. W. forty of the said quarter-section. The lands were used for agricultural purposes, and were not included in any city, town or village plat, and had been occupied by said Henry with his family as a homestead, and were still so occupied by the plaintiff and their children. In May, 1859, the said Henry abandoned his family, ceased to support them, and left the state, and at the commencement of this action was residing in Kansas or California, without any intention to return to, or support his family. For a year previous to the desertion of his family, his mind and memory are alleged to have been so impaired by habitual drunkenness that he was at all times entirely unfit for the transaction of business. On the 15th of April, 1859, he made an assignment in writing of said land certificates to the defendant, *Lyndes*, without the consent of the plaintiff; which assignment is alleged to have been procured fraudulently, and for a grossly inadequate consideration, while the said Henry was in a state of intoxication.

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The defendant demurred to the complaint: 1. On the ground that the plaintiff had no legal capacity to sue, because it appeared from the complaint that she was a married woman, and her husband was not joined with her in the action, and it did not appear that she had any title, legal or equitable, to the subject matter of the action, and because it did not appear that the next friend by whom the suit was brought had been duly appointed by the court. 2. On the ground that there was a defect of parties plaintiff, because it appeared from the complaint that if a cause of action existed against the defendant upon the matters charged therein, Henry H. Green, or his guardian lawfully appointed, was the only proper plaintiff. 3. On the ground that the complaint did not state facts sufficient to constitute a cause of action.

The court made an order overruling the demurrer, from which the defendant appealed.

Hopkins & Johnson, for appellant:

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1. A married woman is authorized to sue in her own name only in the cases mentioned in sec. 15, chap. 122, and sec. 4, chap. 95, R. S., and this case does not come within the provisions of either. The plaintiff does not sue for her own earnings, nor claim that this property was her separate estate. 2. The plaintiff had no interest in or title to her husband's property, real or personal, during his life. He could sell any part of it, except the homestead, without her consent. Her inchoate right of dower in the real estate would not be consummate or available until his death. As to a homestead, the law restrained the husband from transferring *his* title without the wife's consent, but gave *her* no title. Having no interest in the property in controversy, she cannot maintain the action. 3. This suit would not affect the rights of the husband, and would be no protection to the defendant against him. *Reeve vs. Dalby*, 2 Sim. & S., 464; *Howland vs. Fort Edward Paper Mill Company*, 8 How., Pr. Rep., 508, and authorities there collated. 4. Sec. 24, chap. 134, R. S., forbids any *alienation* of land occupied as a homestead, by the *owner* thereof, if a married man, without the wife's consent. But the party who holds land under a school land certificate, does not *own* the land, and therefore cannot alienate it. *Smith vs. Muriner*, 5 Wis., 561. Besides, the plaintiff seeks to set aside the sale of certificates covering 160 acres, and does not select a homestead therefrom. 5. The husband himself could not have the sale set aside, without offering to restore the consideration received by him, which the plaintiff does not offer to do.

I. E. Messmore and Hugh Cameron, for respondent :

1. When the husband has left the state, with the intention to renounce his marital relation, the wife may sue alone. *Gregory vs. Pierce*, 4 Met., 478; *Dean vs. Morgan*, 4 McCord, 148; *Rhea vs. Rhenner*, 1 Peters, 105; Cary's Rep., 87; Edwards on Parties, 151. When the husband is a lunatic, the wife may sue alone. *Carter vs. Carter*, 1 Paige, 463. 2. Henry Green was rightfully in possession of the land mentioned in the complaint, and owned and occupied a dwelling house thereon, claiming it as his homestead, and it was therefore exempted by sec. 28, chap. 34, R. S. Being a married

man he could not alienate the exempted property without the consent of his wife. Sec. 24 of same chapter. The assignment of the certificates, if valid, gave the assignee an interest in the lands (*Whitney vs. State Bank*, 7 Wis., 625), and the right of possession thereof, and was therefore an alienation of such lands. 1 Coke's Inst., 118; Dow's Rep., 210; Bouvier's Law Dic., Alienate. 3. Sec. 24 of chap. 134, R. S., was designed to secure a homestead to the wife during coverture, beyond the control of the husband or his creditors, and upon his death the enjoyment of the homestead by the widow during her life. The object of the statute is remedial. It is to protect the wife and children against such husbands as that of the plaintiff, and it should be liberally construed. *Hurd vs. Cass*, 9 Barb. S. C. R., 366; Broom's Legal Maxims, 147, 150; opinion of HOLT, C. J., in *Ashby vs. White*, 2 Ld. Raymond, 938; 1 Smith's L. C., 105, and cases there cited; Dwarris on Stat., 677; Smith on Stat., 672. 4. The plaintiff has a right to the occupancy and enjoyment of the land in question, and, to protect her therein, has a right to the judgment demanded in the complaint. *Bonaparte vs. The Cumden & Amboy R. R. Co.*, 1 Baldwin, 230-1, and cases there cited.

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By the Court, COLE, J. We cannot understand upon what principle the complaint in this case can be sustained. The action is brought by the respondent, a married woman, by her next friend, for the purpose of having the appellant enjoined and restrained from selling or disposing of four school land certificates, which had been assigned to him by her husband, and to have the certificates assigned and delivered up to her. It is alleged that one of the forty acre tracts mentioned in the complaint and covered by one of the certificates, (but which one does not appear,) was, at the time the certificate was assigned, occupied by the husband and respondent and their family as a homestead, and that the same then was, and still is, the homestead, used for agricultural purposes. It is also alleged that the husband has abandoned his marital rights—has deserted his wife and infant children, and ceased to provide for their support; that he has

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left the state and gone to Kansas or California to reside; that he has become an habitual drunkard, with a mind and memory impaired by dissipation; that the respondent and family are entirely dependent for their support upon the proceeds arising from the cultivation of the lands described in the complaint, and if deprived of the possession of such lands, they will be without a homestead, and destitute of all means of support. It is further stated that the wife did not join in the assignment of the certificates, and the complaint contains many other allegations not material to this discussion.

Now it is undeniable that the case presented by the complaint is one which appeals strongly to human sympathy, and excites a wish that it was within the power of human tribunals to relieve from such calamities. For we all admit that it is the duty of the husband and father to live with, comfort and support his wife and children, and that this duty is of the highest and most universal character. It is an obligation springing from the marital and parental relation, and one which the affections and feelings of our nature instinctively prompt us to recognize and observe. And yet there is no power in the courts to compel a husband and father to exercise the virtues of temperance and frugality, to make him live with and comfort his wife and children; and but little power to compel him to contribute to their support. Sometimes society, through its pauper system, seizes upon and appropriates the property of the husband and father to the support of the destitute wife and children; but the state is impotent to prevent a man from becoming a spendthrift and squandering his substance. In the present case, the respondent does not sue to recover her separate property. The action proceeds upon the theory that because her husband has deserted her and his infant children, she can therefore maintain this suit in her own name, to recover his property and set aside his contracts. At least three of the school land certificates mentioned in the complaint were under the absolute dominion and control of the husband. He could do with them as he saw fit. But it is said that the law of this state secures to the wife and family the possession of the home-

stead, and that therefore the assignment of the certificate embracing the homestead is void, because the wife did not join therein. Assuming that this is a correct proposition of law, and that the interest of a party under a school land certificate is such an ownership in the land embraced therein as brings it within the homestead exemption act, and that such certificate cannot be alienated or transferred by the husband without the signature of the wife to the same, does this view essentially change the merits of this case, and improve the right of the respondent to maintain this action? We cannot see that it does. For if, as the argument assumes, the assignment of the certificate embracing the homestead is void for want of the signature of the wife, then how can she possibly be injured by that assignment? The respondent remains in possession of the homestead and cannot be dispossessed thereof by the purchaser of that certificate. She can defend her possession against him, and possibly this is her real and only remedy, though upon this point it is not proper that we should express any decided opinion, as the question is not properly before us. But we are clear that the respondent does not show that she has such an interest or title, legal or equitable, in the certificates named in her complaint, as entitles her to have them reassigned and delivered up to her. Neither can she maintain the suit for the purpose of removing a cloud upon her title to the land. But the most favorable view which can be taken of the case for the respondent is, that the assignment of the certificate embracing the homestead is absolutely void, and, if so, how can she be injured by it? She may still hold possession of the homestead, and defend her possession, even as against the holder of that certificate, in whosoever hands the same may be, and this is the utmost extent of her rights in the premises.

We therefore think the circuit court erred in overruling the demurrer to the complaint. The order overruling the demurrer is reversed, and the cause remanded for further proceedings according to law.

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FLANDERS VS. THOMAS.

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A mortgagee of personal property who sells the same after default, under a power of sale contained in the mortgage, is accountable to the mortgagor for the surplus, after the debt and all reasonable costs and expenses are paid.

12	410
85	460
12	410
113	501

ERROR to the Circuit Court for *Sauk* County.

The facts in this case are sufficiently stated in the opinion of the court.

J. Muckey, for plaintiff in error.

H. W. Clark, for defendant in error.

July 31.

By the Court, COLE, J. This action was brought to recover the surplus moneys claimed to be due on the sale of a lot of logs, mortgaged by *Flanders* to *Thomas*, after the mortgage debt and costs were satisfied and discharged. The chattel mortgage was in the usual form, and contained a clause authorizing the mortgagee, on non-payment of the sums therein secured to be paid, as they became due, to take possession of the mortgaged property, and sell the same at public or private sale, after giving ten days notice of the time and place of such sale, and apply the proceeds to the payment of the notes, returning the residue to the mortgagor, after paying all reasonable costs and charges. Two of the notes secured by the mortgage, one for \$159 31, the other for \$58 43, were returned by the mortgagee to the mortgagor, as paid. The maker or mortgagor paid nothing upon the notes otherwise than by giving the mortgage. The mortgaged property was sold by the mortgagee, and prior to the commencement of this suit, *Flanders* demanded of *Thomas*, the surplus money arising on such sale, over and above the amount secured to be paid on the mortgage. The circuit court instructed the jury that, on default of the payment of the money by *Flanders* at the time specified in the mortgage, the property became absolutely the property of the mortgagee, and that he was not answerable to the mortgagor for any part of the proceeds of such sale; and directed the jury to find for the defendant. The chattel mortgage bore date October 8th, 1857, and was given to secure the payment of

the sum of \$420 74, with interest at 10 per cent. per annum, as follows: the sums of \$159 31, and \$58 43, in thirty days from the first day of October, 1857, according to two notes dated the day last aforesaid, and the sum of \$203 in thirty days from the date of the mortgage. The mortgagee took possession of the property, and sold it on the 8th day of January, 1858, for \$900.

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The law appears to be well settled, that the execution of a chattel mortgage transfers to the mortgagee a defeasible title to the mortgaged property, which becomes absolute *at law* by the failure to pay the debt at the stipulated time. But notwithstanding the mortgagor is divested of all interest in the property at law, he still has an equity of redemption, which a court of equity would protect and enforce. *Nichols et al., vs. Webster*, 1 Chand. R., 203; 2 Story's Eq. Jur., § 1031; *Hart vs. Ten Eyck et al.*, 2 John. Ch. R., 62-99; *Kemp vs. Westbrook*, 1 Vesey Sen., 278; *Charter vs. Stevens*, 3 Denio, 33; *Patchin vs. Pierce*, 12 Wend., 61. The mortgagor, it is said, must bring his bill to redeem within a reasonable time, and before his rights have been foreclosed by a sale of the property on the part of the mortgagee. 4 Kent, 139; Story on Bail, § 287, and authorities in the notes. If, however, the mortgagee sells the property, he is accountable to the mortgagor for the surplus after the debt, and all reasonable costs and expenses, are paid. *Charter vs. Stevens, supra*; *Bryan and Richardson vs. Robert*, 1 Strobl. Eq. R., 342-3; *Hinman vs. Judson*, 13 Barb. S. C. R., 629. And in the case of *Pettibone et al. vs. Perkins*, 6 Wis., 616, this court decided that when at a public sale, held by the mortgagee to foreclose the equity of the mortgagor in a chattel mortgage, there was collusion between the mortgagee and a third person, by which the latter was to bid off the property for the use of the mortgagee, such sale was void, and the mortgagor was entitled to an account of one-half of the earnings of the vessel, and of one-half of the sum for which the vessel had been sold. This case establishes the doctrine that a mortgagee of personal property, who, upon default, takes possession of such property and sells the same, is liable to account to the mortgagor for any surplus over and above satisfying

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the mortgage debt. And it will be observed that this is precisely what the mortgage provides should be done in the present case. The mortgagee is authorized, on non-payment of the sums therein specified, to take possession of the property, and sell the same at public or private sale, after giving ten days notice of the time and place of such sale, and to apply the avails of the property to the payment of the debt, *returning the residue* to the mortgagor, after paying all reasonable costs and charges. Here the mortgagee proceeded under the mortgage, and within two months after the same became due, and while the mortgagor had the undoubted right to redeem, raised the amount due him by a sale under this power. His debt is paid. What right has he to withhold the residue, contrary to the terms of the mortgage, and to all principles of equity and justice?

It has been intimated that there was something in the case of *Nichols et al. vs. Webster*, 1 Chand., 203, in conflict with this doctrine, but we do not so understand that case. There a mortgagor of personal property brought an action of trespass against the mortgagee, who had taken the property into his possession after the mortgage debt became due. The court held that the action would not lie, for the reason that when the condition of the mortgage was broken by the neglect of the mortgagor to pay the money at the time stipulated, the goods became the property of the mortgagee, the mortgagor having no interest in them except an equity of redemption. This is in harmony with all the decisions upon this subject, a great number of which have already been cited in this opinion, which hold that after default in the payment of the money secured by the mortgage, the title to the mortgaged property becomes absolute at law in the mortgagee, and that the mortgagee has a right to reduce it to possession. But at the same time it is asserted, that in equity the mortgagor, upon well settled principles, has a right to redeem upon paying the mortgage debt, providing he does so within a reasonable time, and before his right has been foreclosed by a legal sale of the property. But when the mortgagee proceeds to sell the property, and has raised a sufficient amount to pay his debt and all reasonable expenses,

we do not see any reason why he should not account to the mortgagee for any surplus arising from the sale. June Term,
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It follows from this view that the instruction of the circuit court was erroneous, and calculated to mislead the jury, to the prejudice of the plaintiff in error.

The judgment of the circuit court is therefore reversed, and a new trial ordered.

DIXON, C. J., did not sit in this case.

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MOWRY vs. WOOD.

A debtor gave his note, to which was subjoined the following clause, "Having deposited with [the payee] school land certificates Nos. 112, &c., with authority to sell the same on the non-payment of this note, at either public or private sale, and apply the proceeds hereon without further notice." The note not being paid at maturity, the payee offered the certificates (which were assigned in blank) for sale at public auction, and the same were struck off and delivered to the highest bidder, for a small sum, which was credited by the payee upon the note, and the payee afterwards assigned the note to a third party, who recovered judgment thereon against the debtor, which remained unpaid. In an action brought by the debtor against the payee for a conversion of the certificates, it was *held*, that the deposit of the certificates under the agreement above recited, was not a pledge of personal property, but amounted to a mortgage upon the equitable estate of the debtor in the lands embraced in the certificates; that the only mode by which the creditor could enforce such mortgage, or extinguish the debtor's right of redemption, was by a suit in equity for that purpose; that the transfer of the note to such third party, carried with it the mortgage security, unless otherwise intended by the parties; that the (so called) sale of the certificates by the creditor, independently of, and without the transfer of any part of the debt, was nugatory, and such sale, and the delivery of the certificates to such bidder, did not make the creditor liable to the debtor as for the conversion of the certificates, the debtor's right of redemption not being impaired thereby, and it appearing that the creditor acted in good faith, and under an innocent misapprehension of the law as to his proper remedy.

The decision in *Ainsworth vs. Bowen*, 9 Wis., 348, was made upon the hypothesis, assumed by counsel of both parties, that school land certificates were a proper subject of pledge, and that a sale of the certificates by the pledgee was a sale of the pledgor's interest in the land, and so far as the decision seems to sanction that doctrine, it is overruled.

An assignment of a school land certificate in blank (*i.e.* where the name of the assignee is omitted), is not a transfer of the certificates at law.

Whether equitable mortgages may be created in this state, by the deposit of title deeds, strictly so called, *quæritur*.

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The nature of the estate created by school land certificates, with reference to descent, dower, lien of judgments, and liability to sale on execution, discussed *per* DIXON, C. J.

It seems that in trover for deeds or other evidences of title to land, where the title itself is unaffected by the conversion, and the deed or other instrument has been lost or destroyed through the defendant's mistake or slight negligence or omission, the proper measure of damages would be, such sum as would recompense the plaintiff for any actual loss he may have sustained, and for his trouble and expense in going into a court of equity or elsewhere, to establish and perpetuate the evidence of his title; but if it should appear that the taking or destruction was wanton or malicious, or that the defendant still possessed the deed, and stubbornly or vexatiously refused to surrender it, the jury might give such further damages, by way of punishment to the defendant, or in order to compel the return of such deed, as in their judgment the circumstances might require. *Per* DIXON, C. J.

A pledgor of personal property may waive the notice of sale to which, by law, he would otherwise be entitled.

If the agreement upon that subject is in writing, it is for the court and not the jury to determine whether notice is waived.

It seems that a waiver of notice of sale in such case, does not dispense with the necessity of a demand of payment, before a sale of the pledge.

ERROR to the Circuit Court for *Dane* County.

The complaint of *Wood*, the plaintiff below, alleged that on the first day of March, 1858, being indebted to the defendant, *Luke Mowry*, in the sum of \$625, he executed to him a note therefor, payable in nine months from date, with interest at twelve per cent. per annum from its date until paid, and at the same time, as collateral security for the payment of the note, deposited with the defendant four school land certificates, embracing a quarter section of land in Iowa county in this state, and which were worth \$2,000. The complaint further stated that the plaintiff had paid on said note the sum of \$42; that the defendant had assigned the note to certain third parties, who had recovered judgment and issued execution thereon; that the plaintiff was ready and had offered to pay the amount of said judgment to the owners thereof, if they would surrender up to him said certificates, but they were unable to do so, having never had them in their possession; that he was ready and had offered to pay the defendant the amount of said judgment if he would deliver up said certificates, and procure the satisfaction of said judgment, but that the defendant had refused

to do so, falsely pretending that he had made a sale of said certificates, whereas, in fact, he had wrongfully and fraudulently misapplied the same and converted them to his own use, to the damage of the plaintiff \$2,000, &c.

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The answer of the defendant admitted the execution of said note, and the deposit of said school land certificates as collateral security therefor, but alleged that at the time of pledging said certificates, the plaintiff gave the defendant authority to sell the same at public or private sale at any time after said note should become due, and to apply the proceeds of such sale to the payment thereof; that after the note became due the defendant frequently demanded payment thereof from the plaintiff, which being refused, he, on the first day of April, 1859, advertised said certificates for sale, by posting up in three conspicuous places in the city of Madison, written notices that said certificates would be sold at public auction, at a place in said notice designated, on the 11th day of April, 1859, at 2 o'clock P. M., of which the plaintiff had due notice; and that at the time and place so designated, the defendant, publicly, fairly, and without any intent to defraud the plaintiff, offered said certificates for sale, and sold the same to the highest bidder, one at a time, and endorsed the proceeds of such sale upon said note; and therefore he denied that he had wrongfully misapplied said certificates and converted the same to his own use. The answer also denied that the plaintiff had offered to pay the amount of said judgment to the holder thereof, or to the defendant, upon the surrender of said certificates, or upon any other condition, and denied that the certificates were worth \$2,000, or any considerable part of that sum.

The plaintiff and defendant were both sworn as witnesses in their own behalf. The plaintiff testified that he never saw any notices of the sale of said certificates posted up, and never had any notice or intimation that they were about to be sold by the defendant, and that the land embraced in the certificates was worth from \$12 to \$15 per acre; that the amount due to the state on said land was about \$3 per acre; that in June or July, 1859, he offered the defendant to pay him the note, when the defendant said he had sold it; that

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he then demanded the note and securities, and said he was ready to pay the note, and has since secured the judgment rendered thereon. Several other witnesses on the part of the plaintiff, testified that the land embraced in the certificates was worth from seven to ten dollars per acre. To all this testimony as to the value of the land, the defendant objected, on the ground that the proof should be confined to the value of the certificates, and not that of the land; but the court overruled the objection, and the defendant excepted.

The defendant testified that after the note became due he frequently demanded payment thereof from the plaintiff; that on the 26th of March, 1859, he told the plaintiff that he should commence advertising the school land certificates for sale, and give ten days' notice thereof; that he accordingly, on the first day of April, 1859, advertised the same for sale as stated in his answer, and, at the time and place mentioned in the advertisements, sold said certificates at public auction, one at a time, and struck them off to Jason Mowry, who was the highest bidder, at twelve cents per acre, and endorsed the proceeds of said sale, being \$20, upon said note; that after the sale of the certificates, the plaintiff told him "he was prepared to settle up," but made no tender of the money. The note was here offered in evidence, for the purpose of showing the authority to sell the certificates, and was as follows: "§625. Madison, March 1st, 1858. Nine months after date, for value received, I promise to pay to *Luke Mowry* or order, at the Dane County Bank, six hundred and twenty-five dollars, with interest at the rate of twelve per cent. per annum after due, until paid. Having deposited with him school land certificates, Nos. 112, 113, 114 and 115, with authority to sell the same on the non-payment of this note, at either private or public sale, and apply the proceeds hereon, without further notice, (of the 500,000 acre tract.) A. S. WOOD."

Several witnesses were sworn on the part of the defendant, as to the value of school land certificates, and estimated their market value in Madison at the time of the sale by the defendant, variously, at from six to twenty cents per acre of the land embraced therein; some testifying that the qual-

ity of the land would make some difference in the market price of certificates, and others, that it would not.

The court charged the jury as follows:

"If the contract of bailment or pledge in this case provided that the sale of the pledge might be made without notice, then no notice of the sale was required; but the defendant in such case cannot sell the pledge without first making a demand for the payment of the note. This demand need not be made in any particular form of words; any words will make a demand which give the pledgor distinctly to understand that payment is unqualifiedly exacted at the time.

"If notice is not waived, then the defendant could not legally sell the certificates without giving a reasonable notice of the sale, so that the public may know of the time and place of the sale, and of the property to be sold, and the terms of sale; and also giving to the plaintiff, the pledgor, actual notice of such sale, and demanding the payment of the note. Whether such public notice was given in this case, and whether such notice was reasonable as to time, and whether such actual notice and demand were made, are questions to be determined by you. In case you find for the plaintiff, then he is entitled to recover the cash market value of the property at the time of its conversion by the defendant. In determining this value, you may take into consideration both the market value of the land represented by the certificates, and the market value of the certificates as such."

The defendant excepted to so much of said instructions as declared that the defendant could not sell the pledge without first making a demand for the payment of the note; and to so much as declared that if the jury found for the plaintiff he was entitled to recover the cash market value of the property at the time of its conversion, and that in determining that value the jury might take into consideration both the market value of the land embraced in the certificates, and the market value of the certificates as such.

The court also instructed the jury "that if the pledged property was purchased for the benefit of the defendant, and

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in such a manner that he could control it as his own, it was optional with the plaintiff to repudiate the sale, and, on paying his indebtedness, to redeem the property;" to which instruction the defendant excepted.

The defendant asked the court to charge the jury as follows: 1. "That upon the non-payment of the note when due, the payee had a right to sell the pledged certificates upon a reasonable notice, and apply the proceeds of the sale to the payment of the note;" which instruction the court gave with the following qualification: "after demanding payment of the note." 2. "It was not necessary that *Mowry* should give *Wood* written notice of the sale. If he gave him notice otherwise, you have a right to take that into consideration, and decide whether it was reasonable notice, when taken together with the posted notices;" which instruction the court gave, with the following qualification: "but such notice must be actual notice to the plaintiff." 3. "*Mowry* had a special property in the certificates, and had a right to the possession of them until the note was paid, or a tender of the full amount due thereon was made to him by *Wood*, or some one in his behalf; and unless this special property had been terminated, the plaintiff cannot recover;" which instruction the court gave with the following qualification—"unless you find that the defendant had wrongfully converted the property to his own use;" to the refusal of the court to give which instructions in the terms asked for, and to the said qualifications attached thereto, the defendant excepted.

The defendant's counsel also requested the court to instruct the jury as follows: 4. "In the sale of the certificates, *Mowry* was to give a reasonable notice of the time and place, and to use no unfair means to deter persons from buying, and if he has done this, and applied the proceeds of the sale to the payment of the note, so far as the same would go, then the plaintiff cannot recover." 5. "It was necessary before bringing this suit, that *Wood* should make a tender of the amount due on the note, in money, unless waived by *Mowry*, and also demand a return of the certificates, and unless he has done this he cannot recover." 6. "If the jury

find that the note was made payable at a time certain, and at a particular place, then no demand of payment was necessary, before advertising the pledge;" which several instructions the court refused to give, and the defendant excepted.

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The jury found for the plaintiff "and that the defendant was guilty as charged in the complaint," and assessed the plaintiff's damages at \$640. Motion for a new trial overruled, and judgment on the verdict.

Nat. Rollins, for plaintiff in error.

Smith, Keyes & Gay, and *Wakeley & Tenney*, for defendant in error.

By the Court, DIXON, C. J. If the school land certificates, and *Wood's* interest under them, could be regarded as personal property, and the transaction as a pledge, still the judgment of the circuit court would have to be reversed. The judge left it to the jury to determine whether *Wood* had waived notice of the intended sale of the certificates. This was error. The agreement was in writing, signed by *Wood*, and its execution undisputed. There was no parol evidence on the subject, and whether there was a waiver depended upon the proper construction of the written agreement, which was a question of law for the court and not of fact for the jury. It is clearly competent for the pledgor of goods to waive the notice to which, by law, he is entitled. *Wilson vs. Little*, 2 Coms., 443; *Allen vs. Dykers*, 3 Hill, 593; *Dykers vs. Allen*, 7 id., 497. And if there be a special agreement regulating the mode of sale, it must be complied with. *Edw. on Bailments*, p. 260. The agreement in this case was clear and explicit. Notice was expressly waived. There was, therefore, upon that point, nothing to submit to the decision of the jury, and they should have been instructed, as matter of law, that no notice was required.

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Viewed in the same light, the instructions in regard to the necessity of a demand for payment before the certificates could be lawfully sold, were probably correct. *Stearns vs. Marsh*, 4 Denio, 227, and cases there cited. A waiver of notice of sale is not a waiver of notice to redeem. *Wilson vs. Little*, *supra*.

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But the fundamental error into which both court and counsel seem to have fallen on the trial below, arose from supposing that the certificates and *Wood's* interest in the land were personal property, and endeavoring to apply to the case those principles which would govern property of that kind under like circumstances. This mistake was common to the counsel of both parties, and may perhaps have been, in part, attributable to the decision of this court in the case of *Ainsworth vs. Bowen*, 9 Wis., 348. That was a similar case, and was tried at the circuit upon the theory that the certificates were the proper subjects of pledge; that a sale of them by the pledgee was a sale of the pledgor's interest in the land, and that, if the pledgee converted them, such conversion was, if the pledgor so elected, an extinguishment of that interest, for the value of which the pledgee was responsible in an action of trover, or on the case, or by way of counter-claim to an action by him against the pledgor to recover the original debt. It was argued here upon the same hypothesis, and although it now seems to me to have been improper, we decided it upon the assumption of counsel that the certificates were mere personalty and subject to pledge as such, at the same time suggesting our doubts and withholding any opinion upon the question.

In this case the controversy below was mainly as to the measure of damages. For the plaintiff it was insisted that it was the market value of the land represented by the certificates; for the defendant, that it was the market value of the certificates at Madison, the place where the agreement was entered into, and where the sale was made. The judge overruled the objections of the respective counsel, and admitted evidence as to both, and charged the jury that in determining the damage sustained by the plaintiff, they might take both into consideration. If the acts of *Mowry* amounted to a conversion or unlawful detention of the certificates, it seems to me that neither of these would be the true rule of damages. Both proceed upon the notion that a conversion of the certificates was a conversion of the land, or of the borrower's interest in it, and are graduated by the value of that interest. This, it appears to me, would be wrong,

especially in a case like this, where the alleged act of conversion proceeded from an innocent misapprehension of law on the part of the lender, as to his rights, and the course to be pursued by him to foreclose the borrower's equity of redemption. The certificates were not title, but merely the evidences of title. They might have been utterly lost or destroyed, and yet the title or ownership of the land have remained subject to the same conditions under which it was then held. Hence, the conversion of the certificates was not a conversion of the land, or of *Wood's* interest, for those were incapable of conversion. As mere contracts on paper, to the possession of which the owner was entitled, the certificates were the same as any other chattel, and it is in this light, I apprehend, that trover for title deeds is maintained. It would not seem to be the object of the action to restore to the owner the value of the land, for that he has not lost; but to compensate him for the injury and inconvenience which he has suffered in consequence of his being deprived of the possession of his paper evidences of title, and perhaps, in proper cases, to compel their restitution. For this purpose title deeds are regarded as mere chattels, and an action at law is given for injuries to the possession of them. In actions of the ordinary kind for the conversion of goods or choses in action, as bills or notes, the measure of damages is the value of the property and interest from the time of the conversion. But in such cases there is a substantial loss of property, and the recovery of the judgment and a satisfaction of it, operate as a transfer of the title. There are, therefore, very good reasons for the rule. But an action for title deeds presents a very different condition of things. The deeds are of no value to the defendant, and no case can be found, I think, where the recovery and satisfaction of a judgment, in an action for the conversion of them, have been adjudged to pass the legal title. Such a mode of transferring land would be most anomalous, and under our system of conveyance seems impossible. It is hard to conceive of an instance where the fee, or a less interest in land, could be thus transferred, unless it be in the case of a conversion of a

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note, or bond and mortgage, or of the written evidence of an outstanding equity, by the holder of the legal title. In the case of a mortgage it might follow from the personal nature of the demand, it being regarded in law as a mere chose in action. In that of the legal owner, if he should convert an executory contract to convey, and the vendee should obtain satisfaction for his interest in an action of trover, it might merge or extinguish his equitable right. There may be other cases where the title may be lost or merged, but it seems to me that they cannot be very numerous. I should think, therefore, that in those cases where the title is unaffected, and the conduct of the defendant has not been fraudulent or oppressive, but where the deed or other written instrument was lost or destroyed through his mistake, negligence or slight omission, the more just rule of damages would be such sum as would recompense the plaintiff for any actual loss which he may have sustained, and for his trouble and expenses in going into a court of equity or elsewhere, to establish and perpetuate the evidence of his title, with the costs of the action. In case of an *actual* loss or destruction of a school land certificate, the legislature have provided an easy and cheap mode of replacing it. Upon satisfactory proof by affidavit, the commissioners are authorized to issue a certified copy of the original to the person entitled thereto, which shall have the same force as the original or duplicate. R.S., chap. 28, sec. 54. If the taking, loss or destruction, was wanton or malicious, the jury, might add such sum, by way of punishing the defendant, as in their judgment the circumstances required. *Dennis vs. Barber*, 6 S. & R., 420; *Berry vs. Vantries*, 12 id., 89; *Harger vs. M'Mains*, 4 Watts, 418; *Taylor vs. Morgan*, 3 id., 333. If it should appear that the defendant still possessed the deed or writing, and stubbornly or vexatiously refused to surrender or produce it, damages to the full value of the land, and even beyond, might be given, in order to compel a return, and as a penalty for the obstinacy and vexation.

Although it has long been settled that trover for title deeds may be maintained, yet upon looking into the books, it will be found that there is a most singular scarcity of au-

thorities upon the question of the amount of damages which the plaintiff is entitled to recover. Mr. Sedgwick, p. 490, cites most of the few cases bearing upon it, but says almost nothing upon the subject. *Towle vs. Lovet*, 6 Mass., 394, is the only reported case which I have been able to find, of an action brought by the owner of land, or his representative, against a stranger, for the conversion of a title deed, and there the sum for which judgment should be rendered against the defendant, if the court should be of opinion that the plaintiff, in her capacity of administratrix, was entitled to recover, was agreed upon by the parties, but what it was we are not informed. The action was by the administratrix for a conversion alleged to have been committed in the life time of the intestate, and the only question was whether she could maintain it. The court held that she could, and, among other reasons, said, "that the conversion was committed in the intestate's life time, and while he lived the damages for the conversion accrued to him, which, as a *chose in action*, came to the plaintiff as his administratrix, and did not descend to the heir." In *Clowes vs. Hawley*, 12 John., 483, trover by the assignee of a bond conditioned for the conveyance of a tract of land, was maintained against the obligor, and it appearing that the plaintiff had done every thing requisite on his part, to entitle him to a conveyance, it was held that he was entitled to recover the value of the land which was to be conveyed. The peculiar circumstances of the case justified the rule. The defendant held the legal title to the land, and payment of the judgment would extinguish the plaintiff's equitable interest. The defendant had wrongfully converted the bond, and it was not for him to dictate whether the plaintiff should sue directly upon it, proceed in equity for a specific performance, or elect to take the value of the land in the action which he had brought. In *Esdale vs. Oxenham*, 3 Barn. & Cress., 225, the plaintiff, having contracted to purchase an estate, had the deeds of conveyance prepared at his own expense, and sent them to the vendors for execution. After being partially executed, the deeds accidentally fell into the hands of the defendant, an attorney, who had a demand against the vendors for business

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done in his profession. Some necessary parties having refused to execute them, the plaintiff abandoned the contract, and demanded the deeds from the defendant, who refused to surrender them, claiming that he had a lien for his demand against the vendors. In trover for the deeds and stamped pieces of parchment, it was held that the plaintiff was entitled to recover the deeds at all events, in a cancelled, if not in an uncanceled state, and a verdict in his favor was entered for one shilling damages, being the value of the parchment upon which the deeds were written. These, so far as I can learn, are the only reported cases which have any direct connection with the question, and it is apparent that they throw little or no light upon it. Mr. Tidd, speaking of the measure of damages in actions of trover, says: "So, in trover for title deeds of an estate, belonging to the plaintiff and of great value to him, though of little or no value to the defendant, if it should appear that the latter is in possession of them and will not deliver them up, the jury would probably be directed to give liberal damages;" but he cites no decisions. 2 Tidd's Pr., 885. And ALDERSON, B., in *Loosemore vs. Radford*, 9 Mees. & Wel., 657, says: "The case resembles that of an action of trover for title deeds, where the jury may give the full value of the estate to which they belong, by way of damages, although they are generally reduced to 40s. on the deeds being delivered up." From this it would appear that the action is resorted to in England principally for the purpose of compelling a return of the deeds, and when that object is accomplished, the damages are merely nominal. In this unsettled state of the law upon the question, I do not at all regret that we are enabled to dispose of this case without deciding it, and having given such impressions as an examination of it has produced upon my own mind, I leave it.

I have already said that the primary error was in regarding the transaction as a pledge, and in supposing that Wood's interest in the land and certificates could be extinguished or converted by a sale, as in the case of goods. Although the certificates, as contracts in writing, may, for some purposes, be regarded as chattels or choses in action, yet it was evi-

dently not the intention of the parties to pledge them as such, but to pledge *Wood's* estate in the land represented by them, as a security for the payment of the debt. That estate was something tangible and of value, but the mere certificates were worthless in the hands of any one except the holder of the estate. If there is no distinction between contracts of that kind made with the state and those made by private individuals—and I can see no reason for any—then *Wood* was possessor of an equitable estate of inheritance in the land, subject, of course, to forfeiture for the non-fulfilment of the conditions of the agreements, but nevertheless, until forfeited, perfect and indefeasible. It was an interest in the fee, and a performance of the conditions would have been followed by the acquisition of it. In case of his death it would have descended to his heirs. R. S., chap. 92, §1. Accompanied by possession it was subject to the lien of judgments and to levy and sale on execution against him. *Jackson vs. Parker*, 9 Cow., 73. And it may be a question whether our statutes have not subjected such estates to the lien of judgments and made them liable to a sale upon execution under any circumstances. R. S., chap. 132, § 38; chap. 5, §§ 9, 13; chap. 134, § 8. It was the proper subject of mortgage in the ordinary form. *Bull vs. Sykes*, 7 Wis., 449. The state had parted with the possession of the land, and *Wood* could have maintained ejectment, or trespass for injuries done to it by a stranger. R. S., chap. 28, § 51. In many of the states the widow is entitled to dower in lands thus held by the husband at the time of his death, and it is not improbable that it is so here. *Rowton vs. Rowton*, 1 Hen. & Mun., 91; *Dean vs. Mitchell*, 4 J. J. Marsh., 451; *Stevens vs. Smith*, id., 64; *Hamilton vs. Hughes*, 6 id., 581; R. S., chap. 89, § 1. If the course prescribed by section 8 of article 10 of the constitution had been pursued, and a conveyance executed, and a mortgage taken to secure the unpaid purchase money, there could have been no question about it, and these executory contracts may be the same in effect. *Smith vs. Mariner*, 5 Wis., 551. And the widow would also, under section 5 of chapter 98, have been entitled to the interest or income of one-third part of the surplus, in

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case of a sale by virtue of the mortgage, after the death of the husband. In *Button vs. Schroyer*, 5 Wis., 598, it was said by this court that the relation between the vendor and vendee, under an executory contract for the conveyance of real estate, possession having been taken and a part of the purchase money paid, and the title withheld as security for the remainder, was analagous to that of equitable mortgagor and mortgagee. It seems to me, particularly in the case of school and university lands, where the constitution has provided for a conveyance and mortgage back, that the relation between the purchaser and the state more nearly resembles that of legal mortgagor and mortgagee. The beneficial seisin and possession of the land is in the purchaser. The state is entitled to the money merely, and until payment in full or forfeiture, seems more in the attitude of a legal mortgagee, who holds the title to secure his debt. After payment and before conveyance, it would be the mere trustee or title holder for the purchaser's use.

From this cursory view of the nature of *Wood's* interest in the land, it becomes apparent that it was incapable of conversion by a mere wrongful transfer of the certificates, and that the transaction, if it amounted to anything, was an equitable mortgage created by the deposit of the certificates, and not a pledge. The object was to give a lien upon his estate to secure the payment of the debt. Whether equitable mortgages may be created in this state by the deposit of title deeds, strictly so called, need not here be considered. In some of the states it has been held that they cannot—that they are forbidden by the statute of frauds and inconsistent with the registry laws. *Bowers vs. Oyster*, 3 Penn. Rep., 239; *Van Meter vs. McFaddin*, 8 B. Monroe, 435. Whatever may be the merits, in opposition to the decisions of the English courts, of the objections founded upon the statute of frauds, those based on the registry laws seem to be supported by very strong reasons. Under their operation the possession of title deeds is no longer necessary to the assertion of rights to real estate. Office copies answer every purpose, and may be used on all occasions, with the same effect as the originals and without accounting for their absence. The possession

of them, therefore, has ceased to be of any practical importance to the owner. Purchasers seldom examine them, but are governed by an inspection of the records; and it is very rare that they are transferred on a sale of the estate. This change of the law and policy in respect to land titles having obviated the necessity out of which the doctrine of implied or equitable liens arose, they would seem incompatible with it and with the rights of third persons who may become interested in the estate.

But in the case we are considering, these difficulties do not exist. By virtue of the statute under which they are issued, these certificates become real muniments of title, as much and even more so than deeds were in former times. The mode of transfer prescribed by statute is an assignment in writing of the certificates, and not an independent conveyance of the holder's interest in the land. R. S., chap. 28, § 53. This implies that, upon sale, the certificates are to be delivered over to the vendee, accompanied by a proper assignment; and such, I believe, has been the common practice of the country. It is declared that the person to whom the same shall be legally assigned, shall have the same rights and remedies thereupon as the original purchaser would have had. It is this assignable quality of the certificates which, for the purposes of negotiation and sale, gives to them the character of a chose in action, as now defined by law; and although they may be acknowledged and recorded, yet no one would think of buying or selling them without delivery, any more readily than a note or bond for money, unless their absence were satisfactorily explained and accounted for. Possession of them is indispensable to a beneficial enjoyment of the estate, for without producing them a conveyance of the fee cannot be obtained. R. S., chap. 28, § 55. Hence possession is some evidence of right of property in the person in whose hands they may be, and they are not within the objections urged against the creation of equitable liens by the deposit of mere title deeds. As to the statute of frauds, if that could be insisted upon in a case like this, the evidence that the certificates were deposited as security for the payment of the debt, is in writing and subscribed by Wood

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It is contained in the note which was given for the money borrowed. I am of opinion, therefore, that the transaction was an equitable mortgage of *Wood's* estate in the land described in the certificates. It was equitable for two reasons: first, because the estate was equitable; and secondly, because the certificates were not so assigned as to transfer them at law. The first is manifest, and the second appears from its being averred in the complaint and admitted in the answer, that, at the time of the deposit, the certificates were assigned *in blank*. By this I understand that instruments, with proper words of assignment, were drawn and subscribed by *Wood*, but that the name of the assignee was omitted. This was clearly not a compliance with the statute, for to constitute an assignment in writing there must be an assignee who takes, as well as an assignor who gives, title at the time the assignment is made (*Galloway vs. Finley*, 12 Peters, 264), and both must be named in the instrument. It would be a palpable violation of the intention of the Legislature, and open the door to numberless frauds, if the estates of the holders could be transferred by a mere delivery of the certificates, which would be the effect of upholding an assignment in blank. It was given as a ready and inexpensive mode of conveyance, and the object in requiring it to be in writing was to secure certain and permanent evidence of the several transfers, with the names of the parties, in order that the title might be traced and frauds and mistakes detected and prevented.

Equitable mortgages, created by the deposit of title papers resembling these certificates, have been sustained in this country (*Williams vs. Stratton*, 10 Smedes & Marsh., 418; *Welsh vs. Usher*, 2 Hill's Ch'y Rep., 167); and even by the deposit of title deeds. *Rockwell vs. Hobby*, 2 Sandf. Ch'y Rep., 9.

It being determined that the transaction was an equitable mortgage, it follows that *Mowry's* proceedings to cut off *Wood's* equity of redemption by a sale of the certificates were utterly nugatory, and that after default his only remedy upon the securities was by a suit in equity for the establishment of his lien, and for a sale, in case *Wood* neglected to pay

the principal interest and costs on a given day. 3 Powell June Term,
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The right to redeem remaining untouched, we are next to inquire how the conduct of *Mowry* in attempting to sell, and in delivering the certificates to a stranger, affected *Wood's* rights in other respects. Was it a wrong with respect to the certificates, as paper evidences of title, to the return of which he was entitled on payment of the debt, for which he can maintain an action at law? Did the sale and delivery operate as a release or extinguishment of *Luke Mowry's* equitable lien? And what interest, if any, did Jason Mowry acquire? Has he a lien for the twenty dollars which he paid upon the purchase? Had the same things happened in the case of a legal mortgage, I should have found little difficulty in answering these questions, and as the case is, I am inclined to think that it is to be governed by the same principles.

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With regard to legal mortgages, it is an elementary principle that the mortgage is but an incident to the debt; that the transfer of the debt carries with it the mortgagee's interest in the security, and that a sale of the mortgage separate from the debt is a legal impossibility. In *Martin vs. Mowlin*, 2 Burr., 978. Lord MANSFIELD says: "A mortgage is a *charge* upon the land, and whatever would give the money will carry the estate in the land *along with it*, to every purpose. The estate in the land is the *same thing* as the money due upon it. It will be *liable to debts*; it will *go to executors*; it will pass by a will *not made and executed with the solemnities required by the statute of frauds*. The *assignment of the debt*, or *forgiving it*, will draw the *land* after it as a consequence: nay, it would do it though the debt were forgiven only by *parol*; for the right to the land would follow, notwithstanding the statute of frauds." The same learned judge, in the case of *The King vs. St. Michaels*, Doug., 630, says: "The mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner."

In *Johnson vs. Hart*, 3 Johns. Cases, 322, and same case in 1 Johns. Rep., 580, where a debtor, as collateral security for

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the payment of his own note, endorsed and delivered to his creditor the promissory note of a third party, secured by a mortgage to himself, which was also delivered, but without assignment, it was held that the transfer of the note carried with it the interest in the mortgage, notwithstanding it was stated in a receipt given by the creditor that the mortgage was "*not assigned*." The assignment of a judgment for a debt carries the debt; and if the latter be secured by a mortgage, it carries the mortgage interest. So if the assignment be of only part of the judgment, and consequently a part of the mortgage debt, an interest in the mortgage passes corresponding to the proportion of the debt assigned. And if the assignment be by writing, under seal, without mention of the mortgage, it cannot be shown, by parol, that the assignor intended to reserve the mortgage. *Pattison vs. Hull*, 9 Cow., 747.

Before foreclosure or possession taken, lands mortgaged cannot be sold on execution against the mortgagee. *Glass vs. Ellison*, 9 N. H., 69; *Jackson vs. Willard*, 4 Johns. Rep., 41. In the last named case, KENT, C. J., says: Until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt, and, in reason and propriety, it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit sed sequitur principale*. It is difficult to conceive what right can be sold which does not convey the debt with it. The control over the mortgaged premises must essentially reside in him who holds the debt. It would be absurd in principle and oppressive in practice, for the debt and mortgage to be separated and placed in different and independent hands. There is no way to render a mortgage vendible but by allowing the debt to go with it: and this would be repugnant to all rule, for it is well understood that a *chose in action* is not the subject of sale on execution. When the mortgagee has taken possession of the land, the rents and profits may,

perhaps, then become the subject of computation and sale. Until then, the attempt would be useless."—"The assignment of the interest of the mortgagee in the land without an assignment of the debt, is considered in law a nullity." Opinion of the court in *Jackson vs. Bronson*, 19 Johns. Rep., 325. A deed or mortgage of land by a mortgagee, passes nothing to his grantee or mortgagee, unless it appears that the debt is also transferred. *Bell vs. Morse*, 6 N. H., 205; *Ellison vs. Daniels*, 11 id., 274; *Aymar vs. Bill*, 5 Johns. Ch'y Rep., 570. The latter was an action to foreclose a mortgage executed to *Aymar* by the defendants *Bill* and *Crane*, upon a house and lot in the fifth ward, and a house and lot in Vandewater street, in the city of New York; and was given to secure the purchase money of the house and lot in the fifth ward, which *Aymar* had sold and conveyed to those two defendants. The mortgage was duly registered the day after its date. The defendant *Bill* had previously mortgaged the lot in Vandewater street to the defendant *Crane* for \$1000, which mortgage was also duly registered on the day of its execution. This mortgage *Crane* held at the time of executing the mortgage to the plaintiff, and afterwards assigned it to V. Fare, of whom the defendant F. was administratrix. She, by her answer, claimed preference over the plaintiff. The mortgage to the plaintiff, in terms, released *all* the "estate right, interest, claim and demand whatsoever" of the two mortgagors to both of the lots. It was determined by the court that "the interest of *Crane* as mortgagee of the lot in Vandewater street, was not at the time of the execution of the mortgage to the plaintiff, an interest in the land capable of being the subject of sale, either absolutely or by way of mortgage, *distinct* from the debt it was intended to secure", the mortgage not appearing to have been foreclosed, or possession taken by *Crane* under it.

A mortgagee, though he have conveyed the whole mortgaged premises, with warranty in fee, can yet foreclose, for this conveyance of the land will not pass his interest in the mortgage. So if he have thus conveyed only a part of the mortgaged premises, he may yet foreclose for the whole, un-

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der a power of sale in the mortgage, and may himself become the purchaser. *Wilson vs. Troup*, 2 Cow., 195.

The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. 4 Kent's Comm., 194. An assignment of the mortgage, without an assignment of the debt, is treated, at most, as a transfer of a naked trust. 2 Story's Eq. Jur., § 1023, note 2.

The doctrine of the common law in regard to the rights of a legal mortgagee, is well summed up by the supreme court of New Hampshire in *Ellison vs. Daniels*, *supra*, where they observe that "so far as it may be necessary to enable the mortgagee to prevent waste, and to keep the land from being in any way diminished in value, or to receive the rents and profits, and, in short, to give him the full benefit of the security, and appropriate remedies for any violation of his rights, he is undoubtedly to be treated as the owner of the land. In all other respects, and for all other purposes, the interest of the mortgagee is treated as a mere personal chattel." The sale of the land mortgaged is not one of the purposes for which his interest may be regarded as real estate.

These principles, so familiar and well established as to legal mortgages, are, for the most part, equally applicable to equitable mortgages created by the deposit of title papers as security, the most material point of difference being that in mortgages of the latter description created by the mere act of deposit, the assignment of the debt does not draw after it the mortgage security. Such mortgages may be transferred, but it can only be done in the same way they are at first created, by a deposit of the title papers with the assignee of the debt. 3 Powell on Mort., 1059; 10 Smedes and Marsh., 426. This distinction is founded on the fact that in such cases there is no written contract defining the rights of the parties. The lien is implied from the mortgagee's possession of the title papers; and hence possession of them becomes an indispensable element in the proof of any one who would take the benefit of the lien as his assignee. In this case, however, the agreement was in writing, and upon it *Mowry* might have compelled a delivery as against *Wood*, or any person but a

bona fide holder for value. It is not, therefore, within the exception, but is in my judgment, in this respect also, like a legal mortgage.

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Now if a legal mortgagee, who, for some purposes, is treated as having a legal estate in the land, cannot, by deed or assignment, transfer an interest therein independently of the debt, still less can it be done by an equitable mortgagee, who at law is regarded as having no right. If such a transfer by the former *be considered without meaning or use, or a nullity*; or if the transferee *must hold the interest at the will and disposal of the creditor who holds the debt*, or as the trustee of a *naked trust* having no beneficial interest, then the same must be equally true of a transfer by the latter in a case like the present. There is no room for distinction between the two cases, and hence I think that Jason Mowry took nothing by his purchase—not even a lien, as against *Wood*, for the twenty dollars that he paid, which *Luke Mowry* became liable instantly to refund.

It follows from the same premises that *Luke Mowry* did did not lose his lien upon the certificates for the security of his debt, and that it passed, upon his subsequent transfer of the note, to Wakeley & Tenney, unless the circumstances attending that transfer show that such was not the intention of the parties. It is true that it is competent for a mortgagee, if he desires, to separate the debt from the mortgage, in which case the mortgage is extinguished. 1 Johns. Rep., 591; 5 Cow., 206; 9 id., 753; 9 Wend., 84. It is also true that it was the intention of *Mowry*, at the time of the sale, to part with the certificates; but it was upon the supposition that he was availing himself of them as securities, in which he was entirely frustrated. He had no intention of parting with them upon any other terms, and as his action for that purpose was nugatory and void, it necessarily left him in the same condition as before. He was liable to refund the price, and for that reason, and because his lien still subsisted, he was entitled to the benefit of it.

Nor do I think that the sale was a wrong of which *Wood* can complain. As a depositary of the certificates, *Mowry* was responsible for ordinary neglect only, or for a violation

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of good faith. 3 Powell on Mort, 1061, b. It is not shown that he acted in bad faith. It was lawful for him to transfer them, provided he, at the same time, transferred the note. The separation was the result of a mistake. It did not impair *Wood's* rights, or complicate his remedies. If he commenced an action to redeem, it was only necessary for him to make one additional party to have the proceeding successful, and compel a surrender of the certificates. If he paid or tendered the sum due on the note to the holders of it, he had the same means of enforcing a return of the certificates from *Jason Mowry*, in case of his refusal, as he would have had from *Luke Mowry*, under like circumstances. If the certificates had been negligently or wantonly destroyed, or placed beyond his reach, the question would have been very different. As it is, I think he suffered no injury, for which he can maintain an action, and that the judgment of the circuit court should be reversed, and the action dismissed.

Ordered accordingly.

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Where one of the counts in an indictment, otherwise in due form, charged that the defendant "did suffer games at cards to be played for gain, by means of cards, then and there used as a gaming device, in his house, &c.;" and another count, otherwise in due form, charged that the defendant "did suffer the games of eucher and poker at cards, and with and by means of cards, then and there used as a gaming device, to be played for gain in his house, &c.;" *Held*, that such counts were good, under section 4 of chapter 117 of the General Laws of 1858.

Chapter 117, Gen. Laws of 1858, examined and construed.

REPORTED from the Circuit Court for *Dodge County*, for the opinion of this Court.

The defendant was indicted in the circuit court for *Dodge county*, in September, 1859, for permitting gaming with cards for gain upon his premises. There were three counts in the indictment, of which only the first and second need be stated here. The first, with specification of time and place,

charges that the defendant "did suffer games at cards to be played for gain, by means of cards then and there used as a gaming device, in his house and erection, &c." The second charges, with like specification of time and place, that the said *David Lewis* "did suffer the games of eucher and poker at cards, and with and by means of cards, then and there used as a gaming device, to be played for gain in his house, &c."

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Before the empannelling of the jury for the trial of the cause, the defendants' counsel moved the court to strike out or quash the first two counts in the indictment, for the reason that said counts were insufficient and did not charge a crime; which motion was denied by the court, and the defendant excepted. A jury was empannelled, and upon trial the defendant was found guilty under the first and second counts. His counsel moved the court in arrest of judgment, upon the same grounds that were assigned for the motion to quash the first and second counts. Motion denied. The defendant thereupon entered into a recognizance, with surety, to appear before the supreme court at its next term, &c., and the circuit judge reported to the supreme court the following questions of law arising in said cause: 1st. Whether the two first counts in the indictment were good, and whether a conviction under them would be legal? 2. Whether the indictment was properly found under section 4 of chapter 169 of the Revised Statutes? [Chap. 117, General Laws of 1858, annexed to chap. 169, R. S.]

The Attorney-General, for the state.

C. Billingshurst, for the defendant, contended, that the two counts under which the conviction was had, were bad in this, that they did not allege cards to be a *gaming device or machine*, but merely that they were *used* as a gaming device. 2. That cards are not a gambling device within the meaning of the statute; that section four relates back to section one, and is designed to punish the keeper of the house for permitting games to be played for gain upon the devices referred to in section one; and that section five provides for the punishment of a *lower grade* of gambling with cards, dice, &c.

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By the Court, PAINE, J. The defendant was indicted under sec. 4, chap. 117, Gen. Laws of 1858 (R. S., p. 970), for permitting games of cards to be played for gain upon his premises. There are several counts which allege that the defendant suffered games at cards "to be played by means of cards, then and there *used* as a gaming device," &c. Sec. 4 punishes any one who allows any game or games to be played for gain upon his premises, "by means of any *gaming device* or machine of any denomination whatever," &c. The objection to the indictment is, that it does not aver that cards were a gaming device, but only that they were *used* as such. In support of this objection it was contended that the several sections of this chapter establish two grades of gambling; one that of gambling by means of some gaming device, the other that of gambling by means of something which is not a gaming device. And, of course, as a part of the argument, it was urged that the words, "a gaming device," as used in the statute, meant only a device designed exclusively for the purposes of gambling. If this argument is correct, then, although cards may be used for the purpose of gambling, yet not being designed exclusively for such use, they would not be "a gaming device" within the meaning of the law, and consequently an averment that they were used as such would be insufficient in an indictment under sec. 4. But on a careful examination of the provisions of the act, we are of the opinion that it divides gambling into two classes, not, however, gambling by means of a gaming device, and gambling without such device, but into gambling by means of a gaming device designed entirely for purposes of gambling, and gambling by means of any other device adapted to the playing of games, but not intended solely for gambling. The statute, therefore, makes not only two kinds of gambling, but two kinds of gaming devices, those designed entirely for gambling, and those not so designed, but which may be used therefor. This seems to us to result from a close inspection of the several sections. Sec. 1 punishes any person who shall "set up or keep any table or gambling device." The word gambling here necessarily includes the idea of playing for

gain, and that this section refers only to a device designed for that purpose, appears conclusively from the subsequent language. For it specifies a "faro bank, roulette, equality, or any kind of gambling table or device, adapted, devised or designed for the purpose of playing any game of chance *for money or property*," &c. Sec. 2 punishes any one who shall bet or play at or upon any gaming table, bank or device prohibited by sec. 1. It is to be observed here that it does not say who shall play for gain, evidently assuming that games at the tables or devices mentioned in the first section are played only for gain. Then sec. 3 punishes any one who shall suffer to be set up or used on his premises for the purpose of gambling, any of the tables or devices mentioned in the preceding sections. Then comes section 4., which the counsel for the defendant contends relates back to sec. 1. But we are unable to see how that construction can be sustained. For if it does, then the section would seem to be entirely unnecessary, for the offense of suffering any gambling by means of the devices mentioned in sec. 1 was fully provided for by sec. 3. The legislature would not have enacted sec. 4 without intending to provide for something not already provided for. Our view of it is this. With sec. 3 the legislature finished the offenses relating to the first class of gaming devices, those used for gambling only. With section 4 they commenced the second class, that is, relating to gambling with devices adapted to that purpose, but not designed exclusively therefor. Its language seems clearly to indicate this. It punishes any person who suffers any game or games *whatsoever* to be played *for gain* "upon his premises by means of any gaming device or machine of *any denomination or name whatever*." This plainly implies that by means of the gaming devices intended by this section, games may be played without being played "for gain." And it is the suffering them to be played for gain, which constitutes the offense. If this referred only to the devices mentioned in section 1, it would not have used this language, but would have assumed that the game could be played only for gain. Again, there is a marked difference between the language descriptive of the device, used in this section, and that in sec-

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tion 1. In the latter it is specific and restricted, naming certain kinds of gambling tables, and then referring only to such other devices as are devised and designed for the purpose of playing games of chance for money or property. Sec. 4, however, intending to punish the suffering of games of chance to be played for gain by any means adapted to that end, uses the most general and comprehensive language in mentioning the device. It includes all "games whatsoever" played "by means of any gaming device or machine of any denomination whatever." This view is further strengthened by reference to the difference between the punishment prescribed by section 3, and that prescribed by section 4. In the former, where the offense is the suffering of gambling by means of devices designed solely for that purpose, the punishment is by fine not less than \$200, nor more than \$500, or by imprisonment, or both. While in section 4, where the offense is suffering gambling by means of devices not designed exclusively for that purpose, the fine is not less than \$50, nor more than \$200, with no imprisonment except on default of payment. The offense in sec. 4 was evidently considered of a lesser grade, and merely because it suffered gambling by a different kind of gaming device. We are, therefore, of the opinion that cards were, in fact, a gaming device, within the meaning of section 4. Still, an averment that they were such might be necessary, unless the statute itself fixes upon them that character, making such an averment unnecessary. And we think it does. Sec. 5 was evidently intended to punish the doing of those things, which section 4 punished the permitting to be done. And this section expressly names cards and dice as being devices adapted to the playing of games of chance. The statute itself, therefore, fixes upon them that character, and we think that this section may be looked at to see whether the law itself has expressly recognized any particular device as a gaming device within its meaning, so as to make an allegation that that device was used sufficient.

It follows, therefore, that the indictment was good. And this seems to us to result necessarily from the position of the counsel for the defendant that the statute establishes two

kinds of gambling. For if that is true, there must be two kinds of gambling devices, else one kind of gamblers must gamble without any gaming device at all. It seems clear to us that the real distinction recognized by the statute is between gaming or permitting gaming with devices designed entirely for playing for money or gain, and gaming or permitting it with devices that may be so used, but which are designed and adapted also to playing for amusement only. We think upon this distinction the entire statute is capable of a consistent and reasonable construction, and that sec. 16, which provides for the seizure of any "gaming table or gambling device," and perhaps some other provisions using similar language, would be held to relate to the devices of the first class, designed for gambling only.

We answer the questions certified to us by the circuit judge, in the affirmative, that the first two counts in the indictment were good, and the conviction under them legal.

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STATE vs. KNEIFLE and others.

The statute does not authorize the judge of a circuit court to *report* a case to the supreme court for its decision of a question of law arising therein, unless the person on whose trial such question arose was *convicted* of an offence.

REPORTED from the Circuit Court for *Juneau* County, for the opinion of this Court.

Indictment against *Martin, Jacob, Franz, Agnes, Mary* and *Theresa Kneifle*, in the circuit court for La Crosse county. The case is stated in the opinion of the court.

Lyndes & Lacy and *Alex. Cameron*, for the state.

E. Fox Cook and *C. K. Lord*, for defendants.

By the Court, DIXON, C. J. At the November term, A.D. 1859, of the circuit court of the county of La Crosse, in the sixth judicial circuit, the defendants above named were jointly indicted for the murder of one William Dennison, said to have been perpetrated by them at the town of Greenfield, in

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said county, on the 9th day of August preceding. With the exception of the defendant *Jacob*, they were at the same term severally arraigned, and plead not guilty. At a subsequent day of the term, on the affidavit and motion of the defendant *Martin*, the place of trial was changed from the county of La Crosse to the county of Juneau, in the seventh judicial circuit, on account of the alleged prejudice of the judge before whom the action was pending. The four last named defendants, who had been so arraigned and plead not guilty, did not join in this motion. The place of trial being thus changed, the defendants were severally recognized for their appearance at the next term of the court for the county of Juneau, to answer the indictment, and the indictment, recognizances, &c., transmitted to the clerk of the court for that county. They severally appeared at the ensuing December term of the court for Juneau county, when the four last named presented their petition or motion to the court, in which they set forth that the removal of the cause from the county of La Crosse, was against their wishes and without their consent; that they were willing and anxious to have their trial in that county, and that they objected to such change of the place of it, both before and at the time the same was directed. They insisted that as to them the circuit court for Juneau county had no jurisdiction, and asked to be discharged from further attendance thereon. Upon this motion, the court made an order, in which, after reciting that it had no jurisdiction to try the said *Franz, Agnes, Mary* and *Theresa*, they were remanded to the county of La Crosse for trial, and the sheriff of that county was directed to take them into his custody. The defendant *Martin* had his trial, and being convicted of manslaughter in the second degree, was sentenced accordingly.

At the March term, 1860, of the circuit court for the county of La Crosse, the cause being on the calendar thereof, the district attorney for that county moved the court for a warrant for the arrest of *Franz, Agnes, Mary* and *Theresa*. This motion, being opposed by their counsel, was denied. A certified copy of the motion and order was transmitted to the circuit court for the county of Juneau.

At the subsequent June term of the Juneau circuit court, the district attorney, after due notice, moved to vacate the order made at the December term, by which the four last named defendants were remanded to La Crosse county for trial. Upon this motion the presiding judge reported the matter to this court for its opinion upon two questions: First, whether the circuit court for Juneau county had jurisdiction to try said defendants; and second, whether that court erred in remanding them.

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Upon examination of the statute we are satisfied that we can take no cognizance of these questions by this mode of proceeding. The only case in which a report is authorized, is that specified in section 8 of chap. 180 of the Revised Statutes, which provides that, if, *upon the trial of any person who shall be convicted in the circuit court*, any question of law shall arise, which, in the opinion of the judge, shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising therein, and thereupon all proceedings in that court shall be stayed. It is very manifest that this case does not fall within the statute. No trial or conviction of the defendants who are to be affected by the decision of the motion, has yet been had, and this court cannot entertain the proceeding. It must, therefore, be dismissed.

CLARK and wife vs. LANGWORTHY.

Where a trespass is relied on as the cause of action, it should be so distinctly set forth that it may be seen with reasonable certainty what is the principal act complained of, and what is mere matter of aggravation.

Where facts which might be relied on as constituting several different causes of action, were stated in one count, in such a manner that the defendant could not determine which cause of action the plaintiff intended to rely upon, nor to which he was bound to answer; the circuit court, on motion of the defendant, should have required the complaint to be made more definite and certain.

From an order denying such motion, an appeal lies.

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APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this case alleges "that during the month of February, 1859, said *A. J. Clark*, one of the plaintiffs, was imprisoned in the jail of Milwaukee county, charged with an offense against the laws of the United States;" that said *Roseline N.* then was, and now is, the wife of said *A. J. Clark*, and that the defendant then was, and ever since has been, the sheriff of said county; "that on or about the 15th day of February, 1859, the said defendant, having as such sheriff, control of said jail, and custody of said *A. J. Clark* therein, and designing to make an illegal and unconstitutional search of the dwelling house of said *A. J. Clark*, in which said *Roseline* and her children then resided, in the city of Milwaukee, in said county, and to take therefrom the private papers of said *A. J. Clark* therein, and to prevent any opposition being made by said *Roseline N.* to such illegal search and seizure, and designing to cause the said *Roseline N.* to be suspected of the commission of some crime, under pretense of which he might cause her to be imprisoned as aforesaid, for the purpose aforesaid, until such illegal search and seizure should be accomplished, did, at &c., employ one Smith, a notorious thief, to solicit, and the said Smith, on said employment, did then and there solicit the said *Roseline N.* to commit the crime of aiding and abetting the unlawful escape of her said husband from said jail;" that said defendant, at said city, in said county, did afterwards, on the 17th day of February, 1859, make and subscribe a complaint in writing, on oath, before one Clinton Walworth, the police justice of said city, upon which complaint the said defendant procured from said police justice a pretended warrant. [Here was set forth a warrant issued by said justice on the complaint of said *Langworthy*, dated Feb. 17, 1859, directed to the sheriff or any constable of said county, commanding them forthwith to arrest and bring before him *Jane Clark*, (*alias*, &c.,) upon a charge of having on that day conveyed into the jail of said county, certain articles mentioned in the warrant, with a view to facilitate the escape of one *Andrew J. Clark*, then lawfully detained in said jail,] she, the said *Roseline N.*, then being, as the said defendant, when

he obtained said warrant, well knew, entirely innocent of the things in said warrant charged, and the said defendant having no cause of suspicion that said *Roseline N.* was at all guilty of the matters in said warrant charged against her. The plaintiffs further allege, that the defendant, after he procured said warrant, designing to keep the said *Roseline* imprisoned in said jail securely, and thereby prevent her release on bail, or otherwise, until as aforesaid, "did not openly arrest said *Roseline N.* by virtue of said pretended warrant, but did, on said 17th day of February, 1859, to beguile her into said jail, under his control as such sheriff, cause it to be falsely pretended to her that her said husband wished her to be present at a meeting in said jail, between her said husband and his counsel, at 4 1-2 o'clock in the afternoon of the day and year last aforesaid; and furnished her with his, said defendant's, written permit for her to visit said jail at the time aforesaid, which representation the said defendant, when he caused it to be made to the said *Roseline* as aforesaid, well knew to be utterly false. And the plaintiffs further show that the said *Roseline N.*, believing said representations to be true, repaired to said jail at about 4 o'clock of the afternoon of the day and year last aforesaid, and on exhibiting said permit, was admitted by the jailor into said jail, and by him shown into a room in said jail, and that as she passed into said room, the jailor locked the door upon her, imprisoning her in said room, without any previous notice to her that she was a prisoner, or was to be for any cause imprisoned: all of which was done by said jailor, by the defendant's express direction. And the plaintiffs further show, that immediately after the said imprisonment of said *Roseline*, the said jailor and a deputy of said defendant, visited the room where she was imprisoned, and threatened to search her person, and then and there did search in the pocket of her dress, and took from her a key to a desk in her house, in which said *A. J. Clark's* private papers then were; which was done by said jailor and deputy, by the express orders of said defendant, and without any warrant or authority whatever to search her person, or to take said key." And the plaintiffs further show, that on the 18th day of February, A. D. 1859, the

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said Clinton Walworth was attending to his duties as police justice, in his office in said city, as the defendant then well knew, and that the defendant ought to have taken said *Roseline* before said justice on the day and year last aforesaid, according to the command of said pretended warrant, and that said *Roseline* requested said defendant so to do; but that said defendant, "for the purpose of continuing and completing said illegal search and seizure which he had begun but not completed, on the night of the 17th of February, 1859," refused so to do, and illegally and wrongfully detained said *Roseline* in jail all day of the 18th of February, 1859, and all night of that day, without any legal warrant or authority whatever; and that on the 19th day of February, A. D. 1859, "after said defendant had completed said illegal search and seizure," he caused said *Roseline* to be conveyed from said jail, before said police justice, who thereupon decided that said pretended warrant did not authorize the imprisonment of said *Roseline*, and she was then and there discharged from said imprisonment. "The plaintiffs further show, that during the said imprisonment of said *Roseline N.* in said jail, the defendant refused to furnish her a chair to sit upon; and the only bed furnished to her during said time, was one brought for her use from the wood pile in the yard of said jail, and that the same, from exposure to rain, was so wet that said *Roseline* could neither sit or lie upon it without endangering her health; that said *Roseline* had left at home her child of about six years of age, when she went to said jail as aforesaid, and that said *Roseline* requested the defendant's said jailor and deputy to inform her child where she, said *Roseline*, was, which they refused to do; and that said *Roseline* suffered, during her said imprisonment, great anxiety on account of her said child." And the plaintiffs further show, that said *Roseline N.*, by means of said wrongful conduct of the defendant, was greatly injured in the good opinion of her neighbors, and brought into great scandal, suspicion and disgrace. Whereupon the plaintiffs prayed judgment for their damages, &c.

The defendant's counsel moved the court for an order that said complaint be made so definite and certain by amend-

ment, that the precise nature of the charge or charges for which the plaintiff sought to recover might be made apparent, and that certain portions of the complaint (which are indicated above by being enclosed in quotation marks), might be stricken out as irrelevant and redundant, and also that there be stricken out of said complaint all statements of the evidence of the facts set up, instead of the facts themselves, with costs.

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The court denied this motion, with leave to the defendant to answer within twenty days; and from the order denying the motion, the defendant appealed.

Mt. H. Carpenter, for respondent:

1. The order in this cause did not involve the merits, and therefore cannot be appealed from. R. S., p. 825, sec. 10. The very theory of the motion was, that the matter which they moved to suppress was immaterial. How then can the merits be affected by refusing to strike out the immaterial matter. *Bedell vs. Stickles*, 3 Code Rep., 105; *Whitney vs. Waterman*, 4 How. Pr. R., 313; *St. John vs. West*, 4 How. Pr. R., 331; *Tullman vs. Hinman*, 10 id., 90. 2. The motion was properly overruled. All the circumstances attending a trespass may be given in evidence in aggravation of damages, if they are properly alleged. 2 Greenl. Ev., sec. 272; *Churchill vs. Watson*, 5 Day, 140; *Bracegirdle vs. Orford*, 2 M. & S., 77; *Merest vs. Harvey*, 5 Taunt., 442; *Simpson vs. Coy*, 15 Mass., 493; *Sears vs. Lyons*, 3 C. L. Rep., 362; *Wort vs. Jenkins*, 14 John., 352. But they must be averred or they cannot be given in evidence. *Simpson vs. Coy*, 15 Mass., 493. The Code has not changed this rule. *Root vs. Foster*, 9 How. Pr., p. 37. The last case cited is almost like this case, and is a full authority for our complaint.

Corn, Hollister & Cotton, for appellant:

By sec. 29, chap. 125 of R. S., the plaintiff may unite in the same complaint several causes of action, but, by sec. 30, "they must all belong to one class, must affect all the parties to the action, and must be stated separately." There is only one count in the complaint. It is impossible to tell from that count what the precise nature of the charge is. It may be for false imprisonment of the wife, for malicious

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prosecution of the wife, for assault and battery upon the wife, for taking off or converting a key, for trespass and an illegal search at *Clark's* house, or for the alleged official misconduct of the defendant as an officer, in not taking the wife in proper season before the officer who issued the warrant, or not furnishing her proper accommodations in the jail. In case of the first charge, the defendant might deny it, or justify. In case of the fifth, the wife could sustain no action for such trespass and illegal search. The complaint concludes like a count in slander, although no slanderous words are alleged to have been spoken. Here are six several causes of action, all thrown together in one undistinguishable mass, and the court is not to be taxed, at the trial, with the burden of analyzing the complaint, nor is the defendant required to do so. See opinion of Judge SELDEN in *Benedict vs. Seymour*, 6 How. Pr., 298. See also *Shaw vs. Jayne*, 4 id., 119; *R. & W. Pl. R. Co. vs. Wetsell*, 6 id., 70. See also notes under sec. 160 of N. Y. Code, in Howard's N. Y. Code, p. 268.

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By the Court, PAINE, J. We think the motion of the defendant, for an order requiring the complaint to be made more definite and certain, should have been granted. Sec. 22, chap. 125, R. S. 1858, provides that "where the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." We are obliged to confess that this complaint seems to us to come within this provision. For, after carefully examining it, even with the aid of the brief of counsel, it is impossible for us to say what is intended to be relied on as the cause of action. There are facts set forth in it which might be claimed as a cause of action for an assault and battery upon the wife, others for a false imprisonment of her, others that might be relied on as showing a malicious prosecution, and others tending to show that the matter relied on was an illegal search of *Clark's* house and the seizure of his private papers. The brief of counsel would seem to indicate that the latter was intended, for he

refers to the transaction as a violation of the provision of the constitution against unreasonable searches and seizures. But if this was the cause of action, it is obvious that the wife ought not to be joined in the suit. And if not, and some of the acts perpetrated on her were relied on, then it is difficult to perceive what an act of trespass upon her husband's property, or unlawful seizure of his papers, could have to do with the matter. If these were committed, he would have his right of action therefor; but it ought not to be alleged as a part of an action for an assault upon, or false imprisonment of, the wife.

It is suggested that circumstances attending a trespass may be given in evidence to aggravate the damages, if properly alleged. This is undoubtedly so. But the difficulty here is, to say which are the circumstances and which the trespass. The trespass, if one is relied on, should be so distinctly set forth that it may be seen with reasonable certainty what is the principal act complained of, and not facts which might furnish ground for several different actions, stated in one count, leaving it impossible for the other party to know which to reply to. In the case of *Root vs. Foster*, 9 How. Pr., 37, which is cited by counsel as being similar to this, the complaint was obviously for an assault and battery, and the matter objected to was obviously mere matter of aggravation, neither amounting to, nor liable to be mistaken for, a separate ground of action. And under the old system of pleading, it would not have been traversable. 1 Chitty's Pl., 612. We think the plaintiffs should be required to draw the complaint in such manner that the defendant may know whether the action is for an assault and battery, or for false imprisonment, or both, or for a malicious prosecution, or for an illegal search of *Clark's* house.

The order refusing to require this, is reversed, with costs, and the cause remanded.

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The intent of the provision in sec. 5, chap. 45, R. S. 1853, which relates to making, and annexing to a chattel mortgage on file in the town clerk's office, within thirty days before the expiration of one year from the time of its first filing, an affidavit by the mortgagee of his continued interest in the property mentioned therein, was that, in case of failure to file such affidavit, the mortgage should cease to be valid as against creditors who should *thereafter* seize the property, or purchasers who should *thereafter* purchase it. Such affidavit is not necessary to preserve, after the expiration of the year, the right of the mortgagee to maintain his action against a person who had seized the mortgaged property, in violation of his rights, before the year had expired.

APPEAL from the Circuit Court for Kenosha County.

The nature of this action is stated in the opinion of the court. The defendant justified the taking of the property as sheriff, by virtue of a writ of attachment issued at the suit of one Reed, against the property of Joseph Newman, who had previously executed to the plaintiff in this suit, the chattel mortgage, under which he claimed the property. At the time of the alleged taking of the goods, the mortgage debt was not due, but the mortgage contained a clause authorizing the mortgagee to take possession of the property at any time he chose, before or after the debt should become due. The court having excluded the mortgage, when offered in evidence on the trial, judgment of nonsuit was entered.

J. J. Pettit, for appellant, contended, that the right of action, having been perfect at the time the suit was commenced, could be defeated only by a release or satisfaction, (*Allaire vs. Whitney*, 1 Hill, 488; *Sweet vs. Palmer*, 16 John., 182; *Bowman vs. Teall*, 23 Wend., 306; *Hammer vs. Wilsey*, 17 id., 93); that as the mortgagee had a right, by express stipulation in the mortgage, for the purpose of obtaining payment of his debt, to the possession of the goods, whosoever detained the goods from him before such payment was a trespasser, (*Cotton vs. Watkins*, 5 Wis., 634; *Conkey vs. Hart*, 14 N. Y., 22; *Russell vs. Butterfield*, 21 Wend., 300); and that a year from the time of filing the mortgage not having elapsed at the time of the taking, no fault or want of diligence had happened on the part of the mortgagee, and the taking was in violation of his rights. 3 Wis., 277; *Meech vs. Patchin*, 24 N. Y. R., 72-74

O. S. & F. H. Head, for respondent, contended, that as no affidavit was filed by the mortgagee within thirty days before the expiration of one year from the filing of the mortgage, of his continued interest therein, the mortgage then ceased to be valid as against the defendant, who stands, in this respect, in the position of a creditor, and being void, could not be used as evidence of title; also, that as there was no proof that the mortgage was filed in the town where the property was, or in the town where the mortgagor resided, and as possession was not delivered to the mortgagee, the mortgage was invalid as to the parties. *Cotton vs. Marsh*, 3 Wis., 221; R. S. 1858, p. 380.

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By the Court, PAINE, J. This was an action to recover the possession of personal property or its value. The plaintiff claimed under a chattel mortgage executed on the 30th of September, 1858, and duly filed in the proper town clerk's office on the same day. The alleged wrongful taking was on the first day of October thereafter, and this suit was begun on the 7th of the same month. Issue was regularly joined, but the trial was had more than a year after the date and filing of the mortgage. On the trial the plaintiff offered the mortgage in evidence, and it was objected to for the reason that no affidavit had been filed to renew it, as required by sec. 5, chap. 45, R. S. 1858. The court excluded the evidence for that reason.

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We think this was erroneous. The section referred to provides that a chattel mortgage, after being properly filed, shall cease to be valid as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless within thirty days next preceding the expiration of the year, the mortgagee shall make and annex to it an affidavit setting forth his interest, &c.

The clear intent of this provision was, that in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it or purchasers who should thereafter purchase; not that such affidavit was necessary to continue the mortgagee's right of action against a creditor who had previously, and while the

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mortgage was in full force against him, seized it in such manner as to make him a trespasser. *Bates vs. Wilbur*, decided at the last term; *Meech vs. Patchin*, 14 N. Y., 72. The rights of the parties were fixed by the taking, and should have been determined as they were at the commencement of the suit.

The judgment is reversed, with costs, and a new trial awarded.

GEE vs. SWAIN.

Where a person entered into a contract with the corporate authorities of a city, to fill up a lot, &c., in said city, and subsequently made an agreement with the owner of the lot to do the work for him, and receive payment therefor upon delivering to him the street commissioners' certificate for such work: *Held*, that such agreement was valid.

Where there is a variance between the contract alleged in a complaint, and that proven on the trial, of such a nature that if the objection had been taken on the trial, the court below might properly have allowed an amendment to make the complaint conform to the facts, and the evidence was admitted without objection, the judgment of the court below will not be reversed on account of such variance.

APPEAL from the Circuit Court for *Milwaukee* County.

This was an action to recover of the defendant for labor performed and material furnished for him by the plaintiff, in making a fill on lot 6, block 45, in the 3d Ward of the city of Milwaukee, and on the street and sidewalk in front thereof, for which the complaint alleges the defendant agreed to pay the plaintiff thirty cents per cubic yard, amounting to \$421.80, to be paid when the work was completed, which was on the 30th of March, 1859. The answer was a general denial. On the trial it appeared that the plaintiff had entered into a contract with the city of Milwaukee, in the fall of 1858, to make the fill referred to in the complaint, but the evidence on the part of the plaintiff tended to show that after he had commenced the work, it was agreed between him and the defendant, that he should do the work for the defendant at thirty cents per cubic yard, to be paid on delivery

to the latter, of the street commissioners' certificates for such work. It appeared also that the work had been principally performed by the plaintiff in the fall of 1858, was finished in June or July 1859, and amounted, at thirty cents per cubic yard, to the sum demanded in the complaint; and that the plaintiff had, before the commencement of the suit, tendered to the defendant the street commissioners' certificates for the work, which were produced in court at the trial, ready to be surrendered and cancelled.

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A motion for a nonsuit was made and overruled.

The defendant, as a witness in his own behalf, testified that he never requested the plaintiff to make the fill, nor made any contract with him on the subject, and that the only negotiation between them was in reference to the purchase of the certificates, for which the plaintiff had offered to take \$400, which he refused to give. It was proved also, on the part of the defendant, that said lot No. 6 was sold for a special tax of 1859, on account of the street commissioners' certificates issued to the plaintiff for said work, and had been bid in by the city of Milwaukee, and had not been redeemed. Said certificates contained a provision that if the sums certified therein to be due, should not be paid before the time of making out the assessment roll, such sums should be specially assessed upon the lots therein described, and be collected for the use of the holder as other taxes were collected on real estate in the city of Milwaukee, but that in no event should the city be held liable for the amount thereof.

The counsel for the defendant requested the court to charge the jury, "that if they should find that after the work was done by the plaintiff, he accepted the street commissioners' certificates on account of said work, and on account of his previous contract, and the amount of the same was embraced in the tax list of 1859, and the property sold for those taxes, then the plaintiff could not recover," which instruction the court refused to give, and the defendant excepted. The court charged the jury, "that if they found that the defendant, during the progress of the work, agreed to give the plaintiff thirty cents per cubic yard, though the agreement was made after the contract with the city, but at any time before the

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work was completed, still the plaintiff would be entitled to recover;" to which instruction the defendant excepted.

Verdict for the plaintiff. Motion for a new trial denied, the defendant excepting, and judgment on the verdict.

James H. Dodge, for appellant, contended that there was a fatal variance between the allegations in the complaint, and the proof, citing 1 Phil. Ev., 504-6; 2 East, 2; 4 Taunt., 320; 2 Starkie, 385.

L. Wyman, for respondent.

October 15.

By the Court, PAINE, J. The appellant objects that there was a variance between the contract sworn to by the plaintiff and that stated in the complaint, inasmuch as the latter states only an indebtedness for the work on the agreement to pay thirty cents per yard, while the plaintiff swore that he was also to deliver the commissioners' certificates before he was to be entitled to his pay. He testified that he did deliver them or tender them both to the defendant, and they were produced and cancelled on the trial. No objection appears to have been made to his testimony on account of the variance, and if there had been, even assuming an amendment to have been necessary, the court should have allowed it to be made on the trial. It shows no ground for reversing the judgment.

We think also, the court properly refused the instruction asked by the defendant, and that the instruction it did give was correct. The point was, whether, after the plaintiff had taken a contract from the street commissioners for doing work chargeable to the defendant's lots, and had partly performed it, he might then make a contract with the defendant to take him as his paymaster for the same work, and to receive the certificates for his benefit. This seems to have been the substance of the agreement, and it was clearly competent for the parties to make it. Of course, the reception of the certificates afterwards by the plaintiff, would be strictly in accordance with the agreement, and no indication that he took them in violation of it, and for the purpose of enforcing them for his own benefit.

We can see no error, and the judgment is affirmed, with costs.

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MOSHER VS. CHAPIN, impleaded with CHASE.

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Certain land mortgaged by A to B was advertised for sale on a judgment of foreclosure, and just before the day of sale, C (a stranger to the mortgage) represented to B that he had become interested in the property, desired to help A, was acting in concert with him, and, for the purpose of making all he could out of the property, requested B to put off the sale, and give him an opportunity to sell portions of the land to various purchasers; and a verbal agreement was then made between them, that the sale should be postponed one year; that in the meantime C might sell portions of the property for one half cash and the balance in twelve months on mortgage, and B would release such portions from the lien of the decree, taking the cash derived from such sales, and an assignment of the mortgages; and that C, in consideration thereof, should pay all the expenses of the foreclosure, (including a solicitor's fee of \$100,) and in computing the amount due on said mortgage, should add to the 12 per cent. interest therein reserved, interest at the same rate upon the annual installments of interest which had accrued thereon, from the time they severally fell due, and should pay the same rate of interest upon the whole amount found due on the mortgage by that computation, until the same should be paid. Sales of portions of the land were made by C, and portions of the proceeds paid to B, the first of which payments was made on the 13th of May, 1856, and was *applied* by B, in pursuance of said agreement, but the mortgages given to C by the purchasers were not assigned to B, for which reason B did not release the land sold from his mortgage. About a year after the above verbal agreement was made, to a request of B that the contract should be put in writing, C answered, that A himself would come and arrange it, and A called soon after and executed a written agreement, signed by himself alone, and ante-dated May 13, 1856, by which he promised to pay 12 per cent. interest on the balance remaining due on the decree, after *applying* thereon, and in payment of said expenses of foreclosure, the payment made on the day last mentioned, which balance was computed in said agreement according to the terms of said verbal contract between B and C. On a motion by C to compel the sheriff, who had again advertised said land for sale on the decree, to receive, in satisfaction thereof, the amount which would be due thereon according to its terms, without reference to said verbal or written agreement: *Held*, that if the agreement to pay the compound interest could not have been enforced while it was executory, on the ground that contracts to pay more than seven per cent. interest are required by the statute to be in writing, yet as C, through A as his agent, had assented to the application of the first payment to the discharge of that interest, that application should not be disturbed.

Held, also, that the agreement in relation to the compounding of the interest was not usurious.

Held, also, that the stipulation to pay the expenses of foreclosure, including a solicitor's fee, did not make the contract usurious.

Whether the facts disclose a consideration distinct from the forbearance of the debt, which would sustain an independent agreement on the part of C to pay a sum greater than that allowed by law to be taken for interest, *quære*.

Held, further, that the written agreement for the payment of twelve per cent. interest on the balance so computed to be due on the decree, though signed by A only, must be regarded as having been made with the assent of C, and he

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is estopped from denying that A was competent to make it in a form that would give effect to said verbal agreement.

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APPEAL from the Circuit Court for *Rock* County.

Chapin applied to the circuit court for *Rock* county, for an order upon *Mosher*, to show cause why the sheriff of said county should not receive the sum of \$1,612 74 (which had been tendered to him by *Chapin*), in full satisfaction of a decree made by that court for the sale of certain premises mortgaged by one Chase to *Mosher*, and subsequently sold by the former to *Chapin*, and, at the time of the application, advertised for sale by the sheriff, under said decree. After a hearing, the court ordered the sheriff to sell the premises on a certain day, unless on or before that day Chase should pay, or cause to be paid, to *Mosher*, the sum of \$2,529 01, and from this order *Chapin* appealed. The grounds of the application, with all the other material facts of the case, are stated in the opinion of the court.

Knowlton, Prichard & Jackson, for appellant:

1. If we admit the alleged parol agreement between *Mosher* and *Chapin*, the latter was not bound thereby. No contract to pay more than seven per cent. is binding, unless in writing. 2. The written agreement of Chase with *Mosher*, to pay more than 12 per cent. interest on the sum due, for the forbearance of the debt, was absolutely void by chap. 55, Laws of 1856. 3. This written agreement does not bind *Chapin*. Chase nowhere in the instrument intimates that he was acting for *Chapin*. *Mosher* had no right to apply the payments made by *Chapin*, in the manner indicated by that agreement. The appellant is, therefore, entitled to have the mortgaged premises discharged from the lien of the decree, upon payment of the balance which remains after a proper application of those payments. 4. Even if *Chapin* agreed to be bound by Chase's contract to pay 12 per cent., such agreement to answer for the debt of another, not being in writing, stating the consideration, was void by the statute of frauds.

Cary & Pratt, for respondent. [No argument on file.]

October 15.

By the Court, PAINE, J. The material facts upon which this appeal is to be determined, are these: *Mosher* was the

owner of a mortgage executed by Chase, and had recovered a judgment of foreclosure and sale, to make the sum of four thousand two hundred and fifty-six dollars. The premises covered by the mortgage were advertised for sale, but just before the time appointed for the sale, *Chapin* went to *Mosher* and told him that he had become interested in the property, that Chase had got into difficulty, and he (*Chapin*) desired to help him out, and for the purpose of making all he could out of the property, he was desirous of selling portions of it to various purchasers, and wished *Mosher* to put off the sale under the decree and give him an opportunity to do so. He stated at this time also, that he was acting in concert with Chase in the matter. A verbal agreement was accordingly made to the effect that *Mosher* should postpone the sale one year, and that in the mean time, *Chapin* might sell portions of the property, and *Mosher* would release such portions from the lien of the decree, and take an assignment of the mortgages which the purchasers might give, &c. As a consideration for this agreement on the part of *Mosher*, *Chapin* agreed to pay compound interest on some portion of the interest as to which Chase had been in default previous to the decree, also certain expenses incurred by *Mosher*, including a solicitor's fee of \$100, and to pay interest at 12 per cent., on the amount of the decree which should remain unpaid during the year for which the sale was postponed. Various sales were made, and portions of the proceeds were paid over to *Mosher's* attorney; but the mortgages given by the purchasers were not assigned as agreed. Nor did *Mosher* release any portion of the land sold, though ready to do so on the assignment of the mortgages. In consequence of this part of the arrangement not having been executed, *Mosher's* attorney wrote to *Chapin*, requesting to have the agreement put in writing, so that there should be no dispute by Chase, &c., and received a reply that Chase himself would come and arrange it. This was a little more than a year after the arrangement was first made. Chase did call soon after, and executed a written agreement to pay twelve per cent. interest on the balance remaining due on the decree, after applying thereon, and in payment of the various items agreed by

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Chapin to be paid, a remittance of \$1,694, received by *Mosher's* attorney, on the 13th day of May, 1856. The balance remaining after this application, was \$2,972 89. This agreement was signed by Chase alone. *Mosher*, at the same time, executed an agreement, reciting that whereas Chase had that day paid him the expenses, compound interest, &c., he, in consideration thereof, would extend the time on the balance, and delay the sale for one year.

These papers, though executed in 1857, were dated back as of the 13th of May, 1856, the time when the first payment was received by *Mosher's* attorney. Divers payments were subsequently made, when this application was made by *Chapin*, setting forth that he had become the purchaser of the property after the decree was rendered; that payments had been made which reduced the amount then due to the sum of \$1,612 74; and that the sheriff had advertised the premises for sale, and asking for an order for *Mosher* to show cause why he should not receive that amount and discharge the decree. On that order *Mosher* showed, as cause, the agreement and facts above set forth. And the point of dispute is, whether any effect can be given to that agreement, as far as *Chapin's* rights are concerned, or whether he is entitled to have the property discharged on payment of the original decree with interest at the rate of seven per cent. The latter is the claim asserted by him, and the amount he admits to be due is computed upon that theory, whereas, if the agreement is carried out, a much larger amount is due. There can be no doubt that the agreement was made as claimed by *Mosher*. The weight of evidence derived from the affidavits fully establishes that fact; and it is altogether in accordance with the natural probabilities of the case. For it is incredible that *Mosher* should have employed an attorney to make a journey from Racine to Janesville to make this agreement, and then postpone the sale of this property for three or four years, allowing portions of it to be sold by *Chapin*, if he was to receive nothing but his original decree, with interest at seven per cent. The justice of the matter is, therefore, clearly on the side of *Mosher*: and the question is, whether there

is any thing in the rules of law which prevents the accomplishment of justice in this particular case.

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It is claimed, first, that in order to make a valid agreement for more than seven per cent. interest, it must, under our statute, be in writing. And then it is said, that even if *Chapin* did make this verbal arrangement, yet, it not being binding in law, there was no authority to apply any subsequent payments in pursuance of it, but they should be applied on the original decree, with interest at seven per cent. It may be observed, that this objection does not extend to the solicitor's fees, and the expense items agreed to be paid by *Chapin*. For there is no statute requiring such an agreement to be in writing. But even if there was, we are of the opinion that as to these items, and as to the compound interest agreed upon, the objection cannot prevail, for the reason that it appears that *Chapin*, acting through Chase, as his agent, assented to the application of the first payment to those items. Cary states in his affidavit, that when he received the \$1,694, on the 13th of May, 1856, he applied it in pursuance of the verbal agreement previously made. Afterwards he wrote to *Chapin* desiring that the matter might be put in writing, &c., and *Chapin* replied that Chase would call and arrange it. Chase did call, and did assent to the application which had been made by Cary, for he received from *Mosher* a written agreement to extend the time, reciting that these items of expense, and the compound interest, had been paid, and he himself executed a written agreement to pay twelve per cent. interest on the balance due on the decree, which balance was struck after applying the first payment as just stated, and then on the decree, as far it would go. Now it seems to us clear that Chase was the agent of *Chapin* in assenting to that application. *Chapin*, by his letter to Cary, had expressly appointed him for that purpose, and Chase stated that he came at the request of *Chapin*. This application of the first payment is, then, as though *Chapin* himself had assented to it. And, therefore, even if this part of the agreement could not have been enforced while executory, yet if the party himself voluntarily made payments, and applied them upon it, there is no reason why his action

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should be set aside. But it is said this part of the agreement was usurious. We do not think the agreement to pay the solicitor's fees and the expenses, makes it so. A provision for the payment of a specified sum as solicitor's fees, in case of foreclosure, is commonly inserted in mortgages in the first instance, and we have never heard it suggested that this made the agreement usurious, even though providing for twelve per cent. interest. And there seems, really, no reason for saying so. For that is an item of expense necessarily incurred by the party, and if the debtor promises to pay it, it can in no just sense be said to be paid for the forbearance of the loan. If any such thing should be resorted to as a mere cloak for usury, it would, of course, stand on the same footing with all other attempts of that sort; but nothing of the kind appears here. On the contrary, the items of expense, and probably a large part of the solicitor's fee, were incurred at the express request of *Chapin* himself, who desired them to go to Janesville to effect this arrangement. It, therefore, did not constitute usury. *Harger vs. McCullough*, 2 Denio, 119; *Kimball vs. Boston Athenæum*, 3 Gray, 225; *Busby vs. Finn*, 1 Ohio St. Rep., 409.

Neither do we think the agreement to compound the interest upon some of the previous installments of interest, as to which Chase had been in default, makes the contract usurious. It is true that compound interest is not enforceable as a general rule. But this has been placed upon grounds of policy, and because it was hard and oppressive, and not strictly upon the ground of its being usury. And it cannot, in truth, be said to be so. For it is capable of mathematical demonstration, that by compounding the interest, no more is recovered than the exact rate allowed by law for the forbearance of a debt. This whole subject is very fully and ably discussed in *Camp vs. Bates*, 11 Conn., 487, and it seems impossible to deny the conclusion of the court that such a transaction is not usurious. See also *Meeker vs. Hill and others*, 23 Conn., 574.

Having come to this conclusion, that the agreement was not usurious, it is unnecessary to examine whether it disclosed a consideration separate and distinct from that of for-

bearance, which might sustain an agreement on the part of *Chapin* to pay a sum beyond legal interest. There certainly would seem to have been something more than mere forbearance. In the case of *Neefus vs. Vanderveer and others*, 3 Sandf. Ch. R., 268, a party having a large mortgage upon a tract of land, consented to cancel it, and take in its stead a number of small mortgages on corresponding portions of it, for the same aggregate amount, payable at the same times, with the same interest. For doing this he received five hundred dollars, and the court held that it was not usury, inasmuch as there was a consideration entirely separate and distinct from the forbearance. In this case the agreement by *Mosher* to allow portions of the mortgaged premises to be sold, and to release such portions from the decree, and to take assignments of the smaller mortgages given by the purchasers, would seem to be of a very similar nature. He also agreed to postpone the sale of the property, which was already advertised. In *Smith vs. Algar*, 20 E. C. L., 452, the plaintiff having a *fi. fa.* for 60 pounds against the goods of a third party in the defendant's possession, forbore to enforce it, on the defendant's promise to pay him 107 pounds in seven days. Lord TENTERDEN said: "But he had a right to levy 60 pounds, and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum; if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought proper to buy it off at such an expense—I do not see that the consideration is insufficient for the promise." PARKE, J., said; "There is no reason why the forbearing to execute such a writ should not be a good consideration for a promise, by a third person, to pay double the amount at the end of seven days." No question of usury seems to have been suggested in the case, but the court seems to treat the forbearance to execute the writ, at least as to third persons, as a consideration entirely different from that of forbearance of the debt. If this is a correct view of the case, it would tend to show that the forbearance by *Mosher* to execute his order of sale might, as to *Chapin*, be a good consideration for an agreement to pay a specific sum even greater than the legal

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interest. See, also, *Fussel vs. Daniel*, 29 E. L. & E., 369. But if it would be a good consideration for a third person, it is somewhat difficult to see why it would not be a good one also for the debtor himself to agree to pay more. And if that were allowed, it is evident that all the evils designed to be prevented by the usury laws, would follow, if, whenever the creditor had obtained his judgment, he might then, in consideration of forbearing to execute it, bargain with the debtor for whatever compensation his necessities might induce him to promise. It has, accordingly, been held that such an agreement was usurious. *Hopkins vs. Koonce*, 6 Gratt., 387; *Siler vs. Sheets*, 7 Ind., 132. But, as before remarked, we shall express no opinion as to whether there was in this case, such a consideration as would have supported an independent agreement by *Chapin* to pay a sum greater than that allowed by law to be taken for interest.

The only further point to be noticed is, as to the effect of the written agreement made by Chase to pay twelve per cent. on the balance of the decree. It was said that this bound Chase only, and could not affect the land which *Chapin* had bought. This would undoubtedly be so except for the peculiar facts of this case. But upon those facts we think *Chapin* is estopped, in equity, from claiming that an agreement made by Chase, even in his own name only, was not valid and effectual to accomplish the verbal agreement which he had previously made. *Chapin* told *Mosher*, when he first came to him, that he was acting to help Chase, and was acting in concert with Chase. When subsequently written to, to put the agreement in such shape as to be binding in law, he replied that Chase would come and arrange it. And *Mosher* and his attorney had a right, from all this, to assume that Chase was the party beneficially interested, and that for that reason *Chapin* had sent him as the proper person to carry out the arrangement. When they accordingly made the agreement with him, we think *Chapin* is estopped from setting up that he was incompetent to make it effectual. They dealt with Chase as competent for that purpose, upon *Chapin's* statement, and upon his direct reference to Chase, when applied to to act himself. It is then against

equity for him now to set up that Chase had no such power. June Term,
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The order appealed from is affirmed, with costs.

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The assignment by a married man of a lease of a lot, and his sale of the dwelling house on the lot, occupied by him as a homestead, are not within the disability imposed upon the husband, by section 24 of chapter 134 of the Revised Statutes of 1853, in respect to the alienation of a homestead without the signature of the wife.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this case, which was filed in 1859, alleged that the plaintiff, *Platto*, had an estate, as tenant for a term of years, in certain premises therein described, which term would expire on the first day of May, 1861; that he was entitled to the possession of said premises; and that the defendant unlawfully withheld the possession thereof from him. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and specified the following objections: "1. It does not state facts showing any right or title in the plaintiff, nor how, nor through whom the title was derived. 2. It does not state who is the plaintiff's landlord, nor that he has any landlord, nor that any person under whom the plaintiff claims ever had title or possession. 3. It does not state that the plaintiff was ever in possession of the premises claimed, or that he was ever tenant of or under any person; nor is any tenancy whatever stated in said complaint."

The circuit court over-ruled the demurrer, with leave to answer. The defendant then answered, first, by a denial, of every averment in the complaint, and for a further defense, alleged that on the 13th day of April, 1855, one Herring was in possession of said premises, under a lease which would expire about the first day of May, 1861, and owned and occupied a frame building situated thereon, with appurtenan-

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ces; that Herring was a married man, and with his wife and family occupied said building and premises as a homestead; that on the day last mentioned the plaintiff obtained from Herring an assignment of said lease, and a bill of sale of the said building and appurtenances, but did not obtain the signature of Herrick's wife to the assignment or the bill of sale; that on the same day the plaintiff leased the said building and appurtenances to Herring for the term of two years from the 1st of May, 1859: that on the 25th day of June, 1859, while Herring was so in possession of said premises, and claiming the same as his homestead, and before any lawful alienation or sale by him of said premises, or of said building and appurtenances, the said Herring and his wife in due form released and quit claimed the said premises, with the building, &c., to the defendant. To this portion of the answer the plaintiff demurred, on the ground that it was insufficient to constitute a defense. The court sustained the demurrer, and ordered that judgment be entered, "that the plaintiff hath an estate as a tenant for a term of years in the premises described in the complaint herein, &c; and is entitled to the possession of the same, and that he recover the same," and also that he recover costs &c., from which judgment the defendant appealed.

The complaint and answer were verified.

George W. Lakin, for appellant:

1. The plaintiff's demurrer reaches back to the first error (*Schwab vs. Furniss*, 4 Sandf., 704.) The first error is in the complaint, which does not state a cause of action. All that the plaintiff alleges in respect to title is, "that he has an estate as tenant for a term of years," &c. That is not a *fact*, but a conclusion of law. The *commencement* of his particular estate should have been shown. 2 Salk., 526; Stephen on Pl, pp. 306-308. Leases for years may be made to commence *in futuro*. Kent's Comm., 56. If the end of the term only is stated, as here, it is open to the inference that it is to commence *in futuro*. Again, the complaint does not inform the defendant what title he is called upon to combat. If the plaintiff had stated that he was tenant for years—stating the duration of the term, and under whom he claimed,

or if he had stated who was entitled to the reversion, it might have been sufficient. 2. The plaintiff's demurrer is directed only to the second defense, and if that were found insufficient, the issue of fact, raised by the complaint and the first defense, still remained to be tried. 3. The second defense is sufficient. It is founded upon the statute relating to the homestead exemption. R. S., chap. 134, secs. 23-31. It brings the premises within that statute, by showing that they were "owned and occupied" by Herring, a married man. For what constitutes *ownership*? "The lowest and most imperfect degree of title consists in the mere *naked* possession, or actual occupation of the estate, without any apparent right." 2 Bl. Comm., 195. If a debtor is in possession of a house and lot, even by such an imperfect title as this, making the same his homestead, his judgment creditor cannot levy upon and sell them, and divest the owner of such title.

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J. V. V. Platto, respondent, in person:

1. The lease of the land and the buildings thereon are personal property. R. S., chap. 83, § 5; 2 Kent's Comm., 342; *Case of Gay, Adm'r*, 5 Mass., 419; *Doty vs. Gorham*, 5 Pick., 487; *Marcey vs. Darling*, 8 Pick., 283; *Wells vs. Banister*, 4 Mass., 514. 2. As it is not claimed that the property in question was the separate property of the wife of Herring, the grantor, it must be presumed to have belonged to Herring, as the wife possesses no property in the chattels acquired by the husband. 3. The property in question is not a homestead in fact, or in contemplation of law. The opinion of this court in *Phelps vs. Rooney*, 9 Wis., 70, absolutely negatives the theory that sec. 24, chap. 134, R. S., applies where the owner of a house does not also own the land whereon the house stands. See also *Hoyt vs. Howe*, 3 Wis., 752. 4. The statute under which the conveyance to the plaintiff of the property in question is claimed to be invalid, is in derogation of the common law, and must be strictly construed. *Waller vs. Hurris*, 20 Wend., 561; 1 Kent's Comm., 462; *Smith vs. Spooner*, 3 Pick., 229; *Melody vs. Reab*, 4 Mass., 473; *Fairlee vs. Corinth*, 9 Vt., 269; *Mallan vs. May*, 13 Mees. & Wel., 511; *Barker vs. Esty*, 19 Vt., 131; *Phelps vs.*

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Rooney, supra. Statutes are likewise to be construed with reference to the principles of the common law. 1 Kent, 464. 5. Section 24 of chap. 134, R. S., commences with the words, "such exemption," &c., and refers back to sec. 23. It cannot refer forward to sec. 28, and the disability which it creates does not apply to such property as is described in sec. 28.

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By the Court, PAINE, J. One Herring was the owner of a dwelling house upon a lot of which he had a lease. He was a married man, and occupied this dwelling house as his homestead. He sold the house to *Platto*, executing a bill of sale, and also assigned to him the lease, the wife not signing either the bill of sale or the assignment. He afterwards sold both the house and lease to *Cady*, the wife joining in the conveyances. This is a contest between *Cady* and *Platto* for the property, and it depends entirely on the question, whether the transfer to *Platto* was within the disability against alienating the homestead without the signature of the wife, imposed by the law now found in sec. 24, chap. 134, R. S., 1858. It was argued here by counsel on both sides, as though this turned upon the question whether the property could be considered as a homestead, and as exempt under the act. If it turned upon that, it would clearly be within the disability, for sec. 28, which was not referred to by either counsel, expressly provides that any person owning and occupying a house on land of which he is rightfully in possession by lease or otherwise, shall be entitled to the exemption. Whatever question might be raised as to whether such a property could be held exempt as a homestead, if this section had not been enacted, there is certainly no room for question on that point in view of its provisions.

But we do not think that the question presented on this appeal depends upon the other. Although it is conceded that this property might have been held as exempt from forced sale, by virtue of sec. 28, it does not follow that it was within the disability imposed upon the husband by sec. 24, as to alienation without the signature of the wife. It may be observed at the outset, that the principal object of the exemption laws is, to protect the debtor and his family

from the seizure and forced sale of his property by his creditors. This is all that is included in the constitutional requirement on the subject. But it was undoubtedly competent for the legislature, in pursuance of what it deemed to be a sound public policy, to further protect the family of the debtor, by imposing upon him a disability even voluntarily to alienate the land owned by him and occupied as a homestead. But they need not necessarily impose it as to all homesteads. On the contrary, they might deem it wise to establish such a disability only in respect to homesteads where the interest of the occupier in the land was of a permanent character, without including all which were exempted from forced sale. And on a careful examination of the provisions of the statute, it seems to us that this is precisely what they have done.

Sec. 23 exempts a homestead consisting of a certain quantity of land "*owned and occupied by any resident,*" &c. Sec. 24 provides that the mortgage or other alienation of *such* land by *the owner* thereof, if a married man, shall not be valid without the signature of the wife.

Now we do not undertake to say that these provisions intend only the absolute owners of the fee. On the contrary, we think they may well be held to include owners of a less interest. But we do not think they extend to the owners of such an interest as is mentioned in sec. 28. For the words of the statute seem expressly to exclude that idea. Its language is, that any person owning and occupying a dwelling house "*on land not his own,*" may be entitled to hold the house exempt. Thus it will be seen that the disability imposed by sec. 24, relates to the alienation of land by the *owner* thereof, and the exemption privilege conferred by sec. 28, relates to a house owned by a man upon land not his own. The legislature evidently supposed that the case provided for in sec. 28, was not included in the previous sections relating to a homestead. They then enact it, giving the privilege of the exemption, but do not extend to the owner of such a house on land not his own, the disability which had been imposed upon the owners of lands used as homesteads in the previous section. It seems clear that there is no language em-

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played indicating any intention to extend the disability to cases provided for in sec. 28. And it being a familiar rule, that disabling statutes are not to be extended, by construction, to cases not clearly within their provisions, we should not feel at liberty to extend it to such a case, even though we might think the same reason existed for it in the one case as in the other.

But there may be good reason for a distinction between the two. Sec. 28 evidently relates to cases where the only interest of the party in the land is merely of a possessory character, and where no permanent ownership is contemplated. The house is treated, in that section, as the principal object of the exemption. And while the legislature might desire to protect such a temporary home from a forced sale, they might, at the same time, think it not necessary or wise to extend to it the same disability against alienation, which they had established in respect to those where the interest in the land was of a more permanent character.

For these reasons the judgment of the court below must be affirmed, with costs.

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A bank discounted two drafts, drawn by L. & Co. on, and accepted by, M., V. & Co., at 30 days, the proceeds of which were used in the purchase of wheat, which was bought on joint account of the drawers and the acceptors, and was shipped to the acceptors for the purpose of meeting the drafts. The bank assigned the drafts to B., C. & Co. Before the maturity of the drafts, M., V. & Co. suspended payment, and the drafts were protested. About the same time B., C. & Co. also suspended payment, being indebted to said bank, on balance of account, in a sum exceeding the amount of both drafts. The cashier of the bank assigned to M., V. & Co. the account of the bank against B., C. & Co., to enable them to set off the same against the drafts in the hands of B., C. & Co., stipulating in the assignment (which was in writing) that the bank would do nothing to hinder M., V. & Co. from collecting the account; and as a consideration for the assignment, took the note of M., V. & Co., payable one day after date. Before the assignment was made, the cashier, with a view to enable the bank to secure its claim against B., C. & Co. by making such assignment, had requested M., V. & Co. not to pay the drafts, and on the day the assignment was made he informed L. & Co. that he had made an arrangement by which they were relieved from said drafts.

For two years after that time M., V. & Co. were in a condition to have secured L. & Co. in the amount of the drafts, and L. & Co. had extensive dealings with M., V. & Co. (who, at the time of the suit, were insolvent), which were conducted upon the understanding that said drafts were settled. The bank afterwards procured a re-assignment of the drafts from B., C. & Co., agreeing to give them credit for the same on the account above mentioned, and then sued L. & Co. upon the drafts: *Held*, that L. & Co. were discharged from their liability to the bank upon the drafts, on the ground that the assignment of the account to M., V. & Co. for the purpose of being used in payment of the drafts, and the taking of their note at one day after date therefor, was at least an extension to the acceptors of the time of payment of the debt represented by the drafts, for the days of grace to which the note was entitled, without the consent of the drawer; and on the ground that the bank is estopped from now showing, to the injury of L. & Co., that its former representations, upon which they had acted, were untrue; and that the drafts ought to be considered as having been paid with the property of M., V. & Co.

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Held, further, that the bank was bound by the act of its cashier in making said assignment, even if he exceeded his powers in making it, it appearing that the transaction was regularly entered upon the books of the bank, so as to show the fact of the assignment and the consideration received for it, and that the books were often examined by committees appointed for that purpose, and reported correct, and their reports adopted by the board of directors, and that the note of M., V. & Co. was mentioned in the semi-annual reports made under oath to the bank comptroller, as part of the assets of the bank, and the jury, therefore, would have been warranted in finding that the assignment of the account by the cashier was *ratified* by the bank.

Held, also, that there was no error in excluding evidence offered by the bank, on the trial, to show a *parol* understanding between the bank and M., V. & Co., at the time of the assignment, that the account was assigned only for the purpose of being set off by them against the drafts, and that unless they should succeed in making such set-off, the assignment should be returned to the bank, and the note of M., V. & Co. delivered back to them; because, if *parol* evidence is admissible to vary the terms of a written agreement, even when the question arises between one of the parties to it and a stranger (as to which *quære*), the evidence, if admitted, would not have entitled the bank to a verdict.

APPEAL from the Circuit Court for Racine County.

The facts of this case are so fully stated in the opinion of the court, that it is not necessary to state them here at length. On the trial, the plaintiff offered evidence to show what was the duty of the committee whose examination of the books of the bank is referred to in the opinion of the court, and that said committee had no knowledge of the consideration of the note of Mann, Vail & Co., which appeared on the books as a part of the assets of the bank; but the circuit court excluded the evidence, and the plaintiff excepted. The plaintiff also excepted to the admission of evidence

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showing that on the day when the account of the bank against Bradley, Curtis & Co. was assigned to Mann, Vail & Co., the cashier of the bank told one of the firm of *Lathrop & Co.* that he had released them from \$6,000 of Mann, Vail & Co.'s paper by that transaction; and also to the evidence showing that a similar statement was, at the same time, made to *Lathrop & Co.* by one of the firm of Mann, Vail & Co. The cashier of the bank procured a return of the drafts in controversy, from Bradley, Curtis & Co., on the 9th of September, 1857, giving them the following receipt: "Received of D. O. Bradley two drafts drawn by Wm. H. Lathrop & Co. on Mann, Vail & Co., of Buffalo, and endorsed by me as cashier, for which the Racine County Bank will, and does hereby, pass \$6,367 71 to the credit, in account, of Bradley, Curtis & Co., as of date November 1, 1854. GEORGE C. NORTHROP, Cashier." It was admitted that there was no previous action of the board of directors of the bank specifically authorizing the cashier to obtain the drafts of Bradley, Curtis & Co. in the manner he did, and no subsequent ratification of the act further than appears in the testimony. In September and November, 1857, the cashier wrote several letters to Mann, Vail & Co., requesting them to return, cancelled, the assignment of the account against Bradley, Curtis & Co., and offering, on receipt of it, to return their note; but Mann, Vail & Co. replied that they had been notified by *Lathrop & Co.* not to return the assignment, and declined doing so. Mr. Mann testified, on the trial, that his firm had never given the cashier any authority to settle the account against Bradley, Curtis & Co., and that they had never ratified his act in so doing. It was in proof, also, that the firm of Bradley, Curtis & Co. was composed of Bradley and Curtis only. One of the firm of *Lathrop & Co.* was a director in the Racine County Bank from 1856 until the time of the trial.

On the trial, the counsel for the plaintiff requested the circuit court to instruct the jury as follows: "1. That if they believed from the evidence that George C. Northrop [cashier of the plaintiff] had no other authority to make said assignment [to Mann, Vail & Co. of the account of said bank

against Bradley, Curtis & Co.] than such as was derived from his general powers and duties as cashier of the plaintiff, then said assignment to said Mann, Vail & Co. was wholly unauthorized, and conveyed no title or interest therein to said Mann, Vail & Co. 2. That the assignment of the account, if authorized, was no payment of the drafts in question, and in no way affected them as to the plaintiff or defendants; that after such assignment, suit might have been brought against plaintiff or defendants by the holder thereof, and a plea that Mann, Vail & Co. had a set-off thereto would have been no defense, and therefore that the account, if owned by Mann, Vail & Co., did not operate to cancel the drafts or in any way affect the liability of the plaintiff or defendants thereon, until actually set off against them. 3. If the jury believe that Northrop did state to the defendants that he had relieved them from their obligation on said drafts, or did direct them not to pay said drafts while said drafts were owned by Bradley, Curtis & Co, such statements and directions were no defense to this action." The court refused to give these instructions, or any of them, and the plaintiff excepted.

The court, at the request of the counsel for the defendants, charged the jury as follows: "1. That the assignment to Mann, Vail & Co., of the plaintiff's account against Bradley, Curtis & Co., was in due form, and if the jury believe from the testimony that said assignment was executed and delivered by the plaintiff, or was afterwards ratified by it, that thereby Mann, Vail & Co. became the owners of said account. 2. That the plaintiff, having sold the account to Mann, Vail & Co., and covenanted with them to do nothing to prevent its collection, had no right, without authority from Mann, Vail & Co., to purchase the drafts by giving credit for the amount on the account, and if it did so, it could gain no rights thereby. 3. That if the jury find that Mann, Vail & Co., were the owners of the account, and that the drafts were obtained by giving credit on the account, without their authority, then that Mann, Vail & Co. are the owners of the drafts as much as they were of the account. 4. That if the drafts in fact belonged to Mann, Vail & Co., they are virtually paid drafts, so far as the drawers are concerned, and the drawers can

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never be held liable again upon them to any person. 5. If the jury believe from the testimony that the plaintiff never authorized Northrop to take the drafts in the manner he did, and has never since ratified his acts, then it is not the owner of the drafts. 6. If the jury believe from the testimony that it required the assent of Mann, Vail & Co. to complete the arrangement, so that the plaintiff should become the owner of these drafts, and such assent was never obtained, then the plaintiff cannot recover. 7. If the plaintiff, by its own acts, has released Mann, Vail & Co. from all liability to it upon these drafts, then it cannot recover against these defendants. 8. That the plaintiff could not recover against Mann, Vail & Co., both on their note and then on these drafts besides, and if the jury find that the plaintiff has treated the note as still good, and in existence, and has not thus treated the drafts, then the plaintiff must be considered as having made its election, and cannot now be permitted to change. 9. If the jury believe that Mann, Vail & Co. purchased the account for the benefit of the defendants, and that Mann, Vail & Co. and the defendants thereupon acted accordingly, and the plaintiff had knowledge of these facts, then that the defendants have the right to avail themselves of the plaintiff's covenant in the assignment, that it would do nothing to prevent the collection of the account, and that such account is a perfect defense to this suit. 10. That the plaintiff cannot recover unless it is the legal owner and holder of the drafts." To all of these instructions the plaintiff excepted.

Verdict and judgment for defendants.

Cary & Pratt, for appellant:

1. The assignment of the account to Mann, Vail & Co. was unauthorized and void, because there was no express authority from the board authorizing it, and because the general powers of a cashier of a bank which is governed by a board of directors, do not authorize the sale and assignment of a chose in action. *Angell & Ames on Corp.*, §§ 299, 301; *Halowell Bank vs. Hamlin*, 14 Mass., 178; *Hoyt vs. Thompson*, 1 Seld., 320; *Hartford Bank vs. Barry*, 17 Mass., 95; *Barrick vs. Austin*, 21 Barb. (S. C.), 241. There

never was any ratification of the assignment by the board. The report of the committee to the board of directors, does not amount to a ratification. Nothing can be ratified by a board by inference, or by their silence, until it appears that they had knowledge of it. There is no evidence that the board had any knowledge of this assignment at the time said report was made. The plaintiff offered to show that no such knowledge was had by said committee or the board, at the time said report was made, but the proof was rejected, and for this the judgment should be reversed. *Hays vs. Stone*, 7 Hill, 128, 132; *Owings vs. Hull*, 9 Peters, 607, 629; 2 Parsons on Contracts, 46, note U. 2. In this action between the plaintiff and third persons, the real transaction between the plaintiff and Mann, Vail & Co., must govern, and if the written assignment and note do not show the real transaction, then either party is at liberty to prove the same by proof *aliunde*, and the objection that the oral testimony contradicted the written agreement, cannot be urged by either party to suppress the real facts of the case. The rule, as to contradicting written agreements, does not apply where the action is between a party to a contract and a third person. The court, therefore, erred in excluding the plaintiff's proof on this point. 1 Greenl. Ev. § 279; 2 Starkie's Ev., 575-8; 2 Pars. on Con., 68, 69; 2 Cow. & H.'s Notes, p. 1437—last of Note 961; *Strader vs. Lambeth*, 7 B. Monroe, 589; *Champlin vs. Butler*, 18 John., 169; *Reynolds vs. Magness*, 2 Iredell, 26; *Venable vs. Thompson*, 11 Ala., 147; *Krider vs. Lafferty*, 1 Wharton, 303, 314; *Noble vs. Epperley*, 6 Ind., 468; *Pyne vs. Campbell*, 36 Eng. L. & E., 91; *Woodman vs. Eastman*, 10 N. H., 359; *Simonton vs. Steel*, 1 Ala., 357. 8. If the transfer to Mann, Vail & Co., though in form absolute, was in reality conditional, and the delivery was to take effect only on the happening of a certain event *in futuro*, which did not take place, then there was no real transfer of the account to Mann, Vail & Co., but it always remained the property of the plaintiff. *Lansing vs. Montgomery*, 2 Johns., 382; Story on Sales, § 313. 4. The cashier, by virtue of his general powers, had a right to make the exchange of the account for the drafts. It was but re-

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ceiving a debt due the bank, and paying an obligation against it. Yet the court below instructed the jury that the cashier had no authority to cancel said account and take up said drafts, unless specially authorized thereto by the board of directors. 5. The defendants procured the drafts to be discounted for the joint benefit of themselves and Mann, Vail & Co., and used the funds in their joint speculation. They are not, therefore, entitled to be treated as indorsers or sureties of Mann, Vail & Co., although the drafts are in that form. They were principals as much as Mann, Vail & Co., in reality, and were, in fact, the parties to whom credit was given. Nothing short of absolute payment of the drafts, therefore, should discharge them. There is no pretense that Mann, Vail & Co. ever paid the drafts, or paid for the account. The giving of their note under such circumstances is no payment, without a positive agreement to that effect, which is not alleged. 6. The court erred in admitting evidence of the conversation of Mann, Vail & Co., and of the cashier, with Lathrop & Co., which were irrelevant, and in the instructions it gave to the jury, and in the refusal to give those asked by the plaintiff.

Strong & Fuller, for respondents:

The drafts upon which the suit was brought, were not the property of the plaintiff, but of Mann, Vail & Co. 1. The assignment of the account of the bank against Bradley, Curtis & Co., to Mann, Vail & Co., was valid. The cashier, by virtue of his office, had power to sell a worthless account, and take therefor a note which he deemed to be good. If not originally valid, the act has been ratified by the directors. 2. The parol evidence offered to vary the effect of this assignment, was properly ruled out. (1) Parol evidence is inadmissible to vary the effect of written contracts. *Gregory vs. Hart*, 7 Wis., 532; 2 Cow. & H's Notes, 1460-1. (2.) The evidence was immaterial. All that the plaintiff sought to prove was, that there was an agreement that Mann, Vail & Co., should not pay the note, unless they succeeded in collecting the account, or making an offset to the drafts. Suppose they had proved this, what then? Mann, Vail & Co., were still the owners of the account. The plaintiff did

not offer to show that any time was limited, within which the offset should be made. Mann, Vail & Co. had acted in perfect good faith, and used all diligence to make the offset. If the plaintiff had been permitted to show a conditional sale of the account, it would only have proved an agreement which Northrop had endeavored to violate, not Mann, Vail & Co. To make the testimony pertinent they should have offered to prove an agreement by which the title to the account would revert, *at some particular time*, to the plaintiff. The plaintiff could not be permitted to show that the account was sold to Mann, Vail & Co., solely for the purpose of enabling them to make an offset, and then that it had prevented them from making the offset, and thereby acquired title to the account. (3.) The plaintiff was estopped from contradicting its official reports to the bank comptroller, made under the oaths of its president and cashier, showing that it was the owner of the note given by Mann, Vail & Co., and that the amount of the principal and interest of the note was due to the bank on "loans and discounts"—which reports they had continuously made up to and including the first Monday of January, 1860. (4.) The bank was estopped from introducing this testimony, because it had informed the defendants, by its financial agent, and by its records and reports, (with which one of the defendants, as a director of the bank since 1856, must be presumed to have been acquainted,) that Mann, Vail & Co. were the owners of this account, and that the defendants were relieved from their liability on these drafts, and the defendants had acted upon this information and had settled with Mann, Vail & Co. accordingly. 3. Bradley & Curtis owning these drafts when they became due, if they had sold them to other parties, the latter would have taken them subject to all defenses which existed against them in the hands of Bradley & Curtis. If Bradley & Curtis had commenced this suit, the defendants could have brought a suit in equity against them and Mann, Vail & Co., alleging that both those parties were insolvent, and could have compelled the offset of the account against the drafts to be made. Bradley, Curtis & Co. could not have collected the amount out of the defendants, the sure-

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ties of Mann, Vail & Co., when the principal debtors had a perfect defense to the suit, and when, too, the sureties would thereby lose the whole amount, although the principals had virtually paid it before. The arrangement between the defendants and Mann, Vail & Co., by which the latter were treated as having virtually paid the drafts, was therefore a safe and practicable one, and the defendants having made it upon the representations of the plaintiff that Mann, Vail & Co. were the owners of the account, and upon the express, formal covenant of the plaintiff that it would not do anything to hinder Mann, Vail & Co. from paying the drafts by offsetting the account, the plaintiff is forever estopped from setting up that Mann, Vail & Co. are not the owners of the account. 1 Cow. & H.'s Notes, p. 200 et seq.; *Welland Canal Co. vs. Hathaway*, 8 Wend., 480; *Strong vs. Ellsworth*, 26 Vt., 366; *Cowles vs. Bacon*, 21 Conn., 451.

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By the Court, PAINE, J. The following is a statement of the facts of this case, so far as they are material to the right understanding of the decision of the court. *Lathrop & Co.* borrowed money of the *Racine County Bank* with which to purchase wheat. The wheat was purchased on the joint account of *Lathrop & Co.* and Mann, Vail & Co., of Buffalo, and was shipped to the latter for the purpose of meeting the two bills of exchange which *Lathrop & Co.* drew in favor of the bank on Mann, Vail & Co., for the sum of \$3,000 each. These drafts were drawn at thirty days, were accepted, and were discounted by Bradley, Curtis & Co., of Chicago, to whom they were indorsed by the bank. Before their maturity, Mann, Vail & Co. suspended payment, and the drafts were protested. Bradley Curtis & Co., the holders, also suspended at about the same time, being indebted to the *Racine County Bank* in a sum exceeding the amount of the drafts. The cashier of the bank made some effort to collect this indebtedness of Bradley, Curtis & Co., but failed; and in March, 1855, being about four months after the maturity of the drafts, he assigned this account of the bank to Mann, Vail & Co., for the purpose of enabling them to offset it against the drafts in the hands of Bradley, Curtis & Co. The

assignment was in writing, and contained an agreement that the bank would do nothing to hinder Mann, Vail & Co., or their assigns, from collecting the debt or any part of it. The note of Mann, Vail & Co., payable one day after date, was taken in payment. Mann, Vail & Co. made ineffectual attempts to find Bradley & Curtis for the purpose of suing them and enforcing a set-off. A suit was commenced, but service not obtained. So the matter continued for more than two years, until, in the fall of 1857, the cashier procured from Bradley & Curtis a re-assignment of the drafts to the bank, to be *applied on the debt* of the bank against them, which was the same debt that had been assigned to Mann, Vail & Co. The bank then commenced this suit against *Lathrop & Co.* as the drawers of the drafts, and the latter rely on the transaction between the bank and Mann, Vail & Co., with respect to the drafts and the account of the bank, as a defense, claiming that the account against Bradley, Curtis & Co., on which the drafts were re-assigned to the bank, was, at the time, owned by Mann, Vail & Co., the acceptors, and that the drafts must be considered as paid for with their property, and the drawers therefore discharged.

The counsel for the plaintiff claimed that the assignment of the account to Mann, Vail & Co. was made by the cashier without the authority of the board of directors, and that it was not within the general scope of his power as cashier, and was therefore invalid. But we think this may be conceded for the purposes of the case, and yet that the question was entirely immaterial, for the reason that it abundantly appears from the evidence that the assignment was ratified by the bank. It was regularly entered upon their books, so as to show fully the nature of the transaction, so far as the fact of the transfer of the account and the consideration for it were concerned. These were examined and reported correct by committees appointed for that purpose, and the reports adopted by the board. The note of Mann, Vail & Co. appeared in the semi-annual reports to the bank comptroller, as a part of the "bills receivable" belonging to the bank, which reports were made under oath. We think the jury should have found a ratification of the assignment, notwith-

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standing anything that was offered to be proved by the plaintiff upon this point; and that therefore the rejection of this evidence, and the refusal of the court to give the instruction asked as to the powers of the cashier, ought not to reverse the judgment.

The remaining question arises upon the evidence offered by the plaintiff to show that, at the time of the assignment to Mann, Vail & Co., it was agreed that it was for the purpose of enabling them to make the set off, and that their note should not be collected if they failed in making it. This evidence was rejected, for the reason, as it seems, that it would vary the written agreement. The counsel for the appellant contends that this was erroneous, and that the rule excludes parol evidence to vary a written agreement only where the question arises between both parties to it, and not where it arises between one of the parties and a stranger. Some authorities were cited which seem to sustain such a distinction. But from the view we have taken we do not deem it necessary to enter upon a close examination of them. But we must say that even if such a distinction exists, and is properly applicable in some cases, we think there is great doubt of its applicability here. For if it be conceded that the rights of *Lathrop & Co.*, depended upon the character of the assignment of the account to Mann, Vail & Co., then it would seem, necessarily, that its character should be determined according to its legal effect between the parties to the instrument. For it would be very strange, if, as between them, the assignment was absolute, and vested the unqualified ownership of the account in Mann, Vail & Co., to say that the bank could, as against *Lathrop & Co.*, show it to be entirely different, although their rights depended on the precise effect of that transfer.

But we shall not examine this point further, for the reason that we are of the opinion that the evidence offered by the plaintiff, even if admitted, ought not to have varied the result, but that giving it all the effect it could have been entitled to, the jury should still, under proper instructions, have found a verdict for the defendants. And as justifying this conclusion, we will refer, in addition to those already stated,

to the following important facts which were established satisfactorily by the evidence: June Term,
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First. Although Mann, Vail & Co. suspended payment in the fall of 1854, yet they were considered responsible long after that, and after the assignment of the account to them. Mann himself testifies, that for two years after that assignment, they were in a condition to have secured the amount of these drafts. That the bank itself considered them responsible, is evident from the assignment and taking their note in payment. For even the parol evidence offered upon this point, and rejected, went to show that if Mann, Vail & Co. succeeded in making the set-off, then the only recourse of the bank would have been upon their note. And it is clear that the bank would not have made this arrangement, which, if carried out as contemplated, would clearly have discharged the drawers, unless they had supposed the note of Mann, Vail & Co. to be good at that time.

Second. On the same day of the assignment, the cashier of the bank informed *Lathrop* that he had made an arrangement by which *Lathrop & Co.* were relieved from the drafts. The cashier does not remember this, and does not think he said so. But *Lathrop* testifies to it positively, and both his testimony and Mann's show that, in their subsequent dealings, the drafts were treated as settled, which shows that *Lathrop* must have got such information from some source.

Third. After the assignment there were extensive dealings between *Lathrop & Co.* and Mann, Vail & Co., which were conducted upon the understanding that these drafts were settled.

Fourth. Before the assignment, pending the attempts by the cashier to obtain payment from Bradley, Curtis & Co., the cashier in a letter expressly requested Mann, Vail & Co. not to pay the drafts, with a view to enable the bank to secure their claim against Bradley, Curtis & Co., by transferring it to Mann, V. & Co., as it afterwards did.

We think these facts constitute a complete defense to the drawers. The bank and the drawers occupied the relation to each other of subsequent and prior indorsers. Then the substance of the transaction is, that the bank, the subsequent

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indorser, for the purpose of securing a claim against the holder, who has become insolvent, interferes with the payment of the paper by the acceptors, requests them not to pay, and subsequently transfers its claim against the holders to them, for the purpose of having it set off against the drafts, thus securing its claim by the acceptors' note, which it was then to collect. At the same time it informs the drawers that they are relieved from the paper, and they deal extensively with the acceptors for several years on that hypothesis. Unless we entirely misapprehend the matter, stronger grounds for holding the drawers discharged could not well be presented. It is true that, at the time of these transactions, the bank was not the holder of the drafts. But by interfering with the regular discharge of the paper, for the purpose of collecting its claim against the holders, we think its action should have the same effect, as far as the prior indorsers are concerned, as though it had been actually the holder at the time. And we then think the defense is complete upon two grounds: First. The transaction was an extension of the time of payment to the acceptors. For, suppose the bank had, after making the assignment, paid the drafts on the same day, as indorsers, to Bradley, Curtis & Co., could they then have maintained an action against Mann, Vail & Co. before the expiration of the days of grace on their note? It would seem not. For if the agreement was, as was offered to be shown by this parol evidence, that the assignment was made for the express purpose of paying the drafts with the account, the bank covenanting to do no act that should hinder its collection, and Bradley & Curtis being insolvent at the time, it would seem clear that the bank could not immediately pay the drafts, and then recover on the drafts and also on the note against Mann, Vail & Co., and thus shift off upon them its worthless claim against Bradley, Curtis & Co. This was therefore an agreement, if taken as claimed by the bank, by which it extended the time of payment to the acceptors, at least to the extent of the time which the note of Mann, Vail & Co. had to run. And we think the effect of such a transaction should be the same upon prior indorsers, as though the bank had again become the holder, before the

maturity of the note of Mann, Vail & Co. That effect is to discharge the drawer or indorser. Burge on Suretyship, 211; Byles on Bills, chap. 18.

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The other ground upon which the defense may rest, is that of estoppel. It is evident that the defendants, in their subsequent dealings with the acceptors, acted upon the information of the cashier that they were relieved from that paper. It thus comes directly within the familiar principle that where one has made a representation, upon which another has acted and would, as a consequence, be injured if the first were allowed to deny the representation to have been true, he shall be estopped from denying it. No one can believe that *Lathrop & Co.* would have remained inactive for three years, without attempting to secure themselves for their liability on those drafts, if they had not been induced thereto by the representation of the cashier. Such is not the habit of business men of ordinary prudence. And it must be presumed upon such facts, that they would be injured by allowing the bank now to turn round and hold them as drawers. It would seem a palpable violation of the entire spirit of the law relative to the vigilance and good faith of parties to negotiable paper, toward prior parties to whom they intend to have recourse.

And it may be observed that the very application of the account to the drafts which these defendants insist on, is the one which it was the express object of the agreement between the bank and Mann, Vail & Co. to secure. And in buying back the drafts, they expressly applied that account as the consideration. They should then be treated as paid with the property of Mann, Vail & Co., and the remedy of the bank is on their note. To hold otherwise would be to allow the bank to take its chance of securing its claim against Bradley, Curtis & Co., through several years of delay caused by its own arrangement, and then, when Mann, Vail & Co. become irresponsible, to step in and defeat the accomplishment of its own agreement, and have recourse upon the drawers, who, during all this time, had taken no steps to protect themselves on account of the very arrangement made by the bank.

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We think there was nothing in the parol evidence offered that should have had any effect to change the verdict, and that the rejection of it ought not, therefore, to reverse the judgment.

The judgment is affirmed, with costs.

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The words "legal interest," when used in pleadings, may mean either the highest rate allowed by law on special contract, or that which is fixed by law in the absence of such contract; and where the context clearly shows that they are used in the former sense, they ought not to be construed in the latter.

Where a lender made it a condition of a loan in this state, that the borrower should pay exchange on New York, in addition to the highest rate of interest allowed by law on special contract, and this was done solely for the purpose of obtaining such excess, and with the understanding that the note was not to be paid in New York, but in this state: *Held*, that the contract was usurious.

Rock River Bank v. Sherwood, 10 Wis., 280, cited and distinguished.

Since the usury act of 1859, it is not necessary that a defendant should either aver or prove a tender of the principal sum loaned, in order to avail himself of the defense of usury.

APPEAL from the Circuit Court for Kenosha County.

This action was brought in August, 1859, on a promissory note for \$2,000, dated December 1st, 1857, made by the defendants, payable to the order of the plaintiff, twenty-eight months after date, with interest at 12 per cent. per annum, payable semi-annually. The plaintiff claimed to recover \$240, being the two installments of interest which became due December 1st, 1858, and June 1st, 1859.

The defense was usury, and the answer alleged that on the 29th of May, 1855, the defendants, to secure the payment of \$3,800 loaned to them by the City Bank of Kenosha, (which was organized under the banking law of this state), executed their note for that sum, payable at 60 days, indorsed by one William White, which note was renewed every 60 days thereafter, by a note of like amount with the same indorser, until the 15th of October, 1856, when the sum of \$200 (balance due upon another loan of \$1,100) was

added, making the note \$4,000; and such note for \$4,000 was renewed in like manner every 60 days, until the 26th of August, 1857, when the defendants paid thereon \$500 in cash, and gave their note, with the same indorser, for \$3,500, at 60 days. The answer further alleged, that on the 19th of September, 1855, the defendants, to secure a loan of \$2,500 from said bank, executed a note for that sum, indorsed by said White, payable at 60 days, which was renewed every 60 days thereafter, until the 15th of October, 1857, when it was renewed by a note for the same sum, payable in 45 days from date.

The answer further alleged, that said note for \$3,800, dated May 29, 1855, and that for \$2,500, dated September 19, 1855, were payable to the order of said White at an office in Wall street, New York; that said notes were made by the defendants, and the money advanced to them thereon by said bank, at the dates thereof, at the city of Kenosha; and that at the time of the execution thereof it was corruptly agreed between said bank and the defendants, that the defendants should pay, in addition to the legal rate of interest, the amount of the exchange upon New York, which was, at the dates of said notes, and at the maturity thereof, 1 1-4 per cent.; and that the loans were made to the defendants by said bank, expressly upon the condition that they were to pay therefor, in addition to the legal rate of interest, the exchange upon the city of New York, which the defendants promised to do; that the payee White was a resident, and in business in said city of Kenosha, and said bank, which was at all times the real owner of said notes, had its place of business in said city; that said notes were never intended to be paid in the city of New York, but were kept at said bank until their maturity, and were then renewed in manner aforesaid; and that it was at all times understood between the said bank and the defendants, that the business should be transacted in that manner; that at each of the renewals of said notes, the defendants, in like manner, corruptly agreed with said bank to pay, in addition to the legal interest, the exchange upon New York, as aforesaid, which agreement was expressed in each of said notes; and

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that the corrupt agreement made upon the loaning of said moneys, in regard to the payment of exchange upon New York, was made by said bank with intent to exact from the defendants the payment of more than legal interest upon the moneys so loaned; that all of said notes were payable to the order of said White, and by him indorsed to said bank, but that he had no interest whatever in the money advanced upon the first named of either of said series of notes, but was an indorser for the accommodation of the defendants; that at none of the renewals of said notes was any money advanced or loaned to the defendants; but that the sole consideration for both of said series of notes, was the sums of money loaned by said bank to the defendants as above stated.

The answer further alleged, that on or about the 1st of December, 1857, the said two notes for \$3,500 and \$2,500, respectively, were surrendered by the bank to the defendants, who thereupon, in consideration thereof, and for no other consideration, executed three new notes for \$2,000 each, payable in twenty-seven, twenty-eight and twenty-nine months, respectively (one of which is the note mentioned in the complaint), and another for \$185 58, payable in thirty months from that date; "that said note for \$185 58, was given for interest and usurious exchange upon the two notes for \$3,500 and \$2,500, between the maturity of the same and the 1st day of December, 1857;" that said four new notes, at the request of said bank, were made payable to the order of the plaintiff, who was the president of said bank, to whom the corrupt and usurious agreements above set forth were well known; that said notes were still the property of said bank, or if, for any purpose, nominally the property of the plaintiff, were taken by him with full knowledge that the agreements made when the money was loaned, as before specified, were corrupt, usurious and void, and made with intent to exact from the defendants the payment of a large excess above the interest allowed to be taken by law, and were received and held by him to avoid the defense of usury, and to allow said new notes to draw

larger interest than they could have drawn had they appeared to be the property of said bank.

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To this answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a defense, and specified the following objections: 1. It did not show that any illegal interest had been paid by the defendants, or reserved by the plaintiff, on the notes in question, or received thereon by the plaintiff or the bank. 2. It did not show that any money had been reserved or agreed to be taken or paid contrary to law, nor that the place of payment named in the notes mentioned in the answer was not fixed at the request of the defendants, and for their accommodation. 3. It did not allege a tender of the principal sum loaned, according to law.

The circuit court made an order sustaining the demurrer, from which the defendants appealed.

O. E. & F. H. Head, for appellants:

The contract to enforce which suit is brought, was made in 1855, and so far as concerns its construction and validity must be governed by the law in force when the contract was made, chap. 172 of Laws of 1851; since new notes, given without any new consideration, to take up or renew notes previously given, are subject to all defenses which might have been interposed to the original notes, when such new notes are in the hands of the original party, or of a subsequent purchaser with notice. *Tuthill vs. Davis*, 20 John., 285; *Powell vs. Waters*, 8 Cow., 696; *Hackley vs. Sprague*, 10 Wend., 113. If the note was originally tainted, no tender of the principal sum is necessary because of the subsequent statute. *Folsom vs. Blake*, 3 Edw., 442. 2. A note made payable in the city of New York, when the place of payment is not so fixed for the accommodation of the borrower, or at his request, and upon which money is loaned upon condition that the borrower shall pay, in addition to the interest allowed to be taken by law, exchange upon New York, is usurious. *Marvine vs. Hymers*, 2 Kern., 233-235; *Oliver Lee & Co.'s Bank vs. Walbridge*, 19 N. Y., 143, 145; *Meritt vs. Benton*, 10 Wend., 116; *Seneca County Bank vs. Schermerhorn*, 1 Denio, 133; 3 McLean, 601.

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Webster & Schoff, for respondent:

1. It is not alleged in the answer that the defendants, at any of the renewals of the notes, paid any portion of the exchange, nor that the same is included in the new notes upon which this suit was brought, nor that the plaintiff or the City Bank ever required the payment thereof. 2. Usury is not predicated, in the answer, upon the exaction of 12 instead of 10 per cent. interest, but only upon the reservation of the exchange on New York; and it is understood that the denial, in the answer, of the plaintiff's ownership of the notes, was made only to allow the defendants to interpose the plea of usury as to that exchange. The agreement to pay exchange is not usurious. (1.) It is not a promise to pay any *certain* sum of money. (2.) It is not a promise to pay any sum whatever *at all events*. By some financial revulsion, exchange might be against and not in favor of New York. (3.) If it was the intention that the notes should remain in the bank at Kenosha, and be paid there, then the bank and the plaintiff are relieved from the charge of usury, because the payment at the bank of the face of the note, with interest, would be a full payment; the reservation of exchange could not be enforced. Hence, if such exchange were paid by the makers, it would be a voluntary payment, and not usury. *Cuyler vs. Sanford*, 13 Barb. (S. C.), 343; *Lee & Co.'s Bank vs. Walbridge*, 19 N. Y., 134; *Portland Bank vs. Storer*, 7 Mass., 433. 3. If the answer states at all what interest the notes drew, it states that they drew *seven* per cent.; for that is the "legal rate of interest." The court cannot know whether the exchange between Kenosha and New York may not have varied from time to time, through the years 1855, '6 and '7, in such a manner that the several payments of exchange added to the seven per cent., would not have amounted to more than the *ten* per cent. interest allowed by law on special contract. The answer should state the precise facts upon which the usury is alleged, and the quantum of usury taken, and shut out every hypothesis which would render the transaction lawful. *Van Santvoord's Pleadings*, pp. 468, 469; 12 Barb. (S. C.), 601; 3 Hill, 564; *Blydenburgh on Usury*, p. 110; *Clarke's Rep.*, 361 and 453;

2 Sandf. Ch. R., p. 24; 2 Barb. (S. C.), 56; Howard's New York Code, p. 239. The allegation that the note for \$185 58, was for interest and usurious exchange on the two large notes, from their maturity until the 1st day of December, 1857, is too uncertain to constitute a valid defense of usury. What portion of this sum was for interest, and what for exchange, does not appear. All but ten cents may have been for lawful interest, in which case the court would reject it, presuming it to have arisen by mistake.—Counsel also insisted, that the answer should have alleged a tender of the principal sum, and that proof should have been made of such tender, and referred to *Rock River Bank vs. Sherwood*, 10 Wis., 230.

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By the Court, PAINE, J. The first question as to the sufficiency of the answer in setting up usury, arises upon the construction of the words "legal interest," which it contains. It alleges a loan of money by the bank to the defendants, and a series of renewals; that at the time of the loan, the note given therefor was made payable at the city of New York, with the express purpose of exacting from the borrowers the amount of exchange "in addition to the legal rate of interest," and that they were required to pay, and did promise to pay, such exchange, as a condition of the loan: while the understanding was that the note should never be paid in New York, but should be kept and paid in Kenosha. The answer further avers that at each of the renewals the same condition was required, and the same corrupt agreement made to pay the exchange on New York "in addition to legal interest," as a mere cover for usury. But it is insisted by the counsel for the respondent, that the words "legal interest," as used in the answer, must be construed to mean interest at the rate of seven per cent., that being the rate fixed by law in the absence of a contract fixing a different rate. If those words require that construction, the answer fails to show usury. But they were obviously used by the pleader in a different sense, and as meaning the highest rate of interest which the law allowed the parties to contract for. And we think they are as often used in this sense as in the

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other, and that their true sense in any instance must be determined from the subject matter, and the connection in which they are used. Thus if the inquiry relates to a case where no rate is agreed on by the parties, and the object is to ascertain what rate the law fixes in that event, the words "legal interest," would naturally be understood to mean the rate fixed by law in the absence of a contract. But if it relates to a contract claimed to be illegal in providing for more than legal interest, the same words would there just as naturally, be understood to mean the highest rate allowed by law. The very point of the inquiry, namely the validity or invalidity of the contract, would imperatively require that sense. That they are so used in this answer is not only obvious from the entire context, but at the close, where it avers knowledge on the part of *Towslee*, it alleges that he took the note with the full knowledge of the usurious contract, and that it was made with intent to exact "a large excess above the interest *allowed to be taken by law*." It being clear, therefore, that those words are used in this answer as meaning the highest rate at which the parties were allowed by law to contract, and that use being sanctioned by common practice, we think it would be placing a forced construction upon them, to say that they mean interest at seven per cent. Legal interest may as well mean that which is legal by contract, as that which is legal in the absence of a contract. And where the context shows clearly that they were used in the former sense they ought not to be construed in the latter.

The question then remains, whether, with this construction, the answer sets up usury. As before stated, it avers that the bank made it a condition of the loan, that the borrowers should pay exchange on New York over and above legal interest, and the note was made payable there for that purpose, solely with a view of obtaining more than legal interest, and with the understanding that the note was not to be paid in New York, but was to be paid in Kenosha. The same agreement was made at each renewal, and for the same purpose, and with the same lack of intention to have the money paid in New York. We have no doubt the facts

constitute usury. It is true there are cases where exchange between different places has been allowed to be taken in addition to legal interest, where it appeared to have been done in good faith, without any intent to evade the usury law, or where it was done for the accommodation of the borrower himself. But their reasoning implies that where such an arrangement is insisted on as a condition of the loan, and is designed as a mere device by which the lender is to receive more than legal interest, it would be usury. *Marvine vs. Hymers*, 2 Kern., 233; *Merritt vs. Benton*, 10 Wend., 116; *Bank vs. Schermerhorn*, 1 Denio, 133; 3 McLean, 601. In *Stevens vs. Lincoln*, 7 Met., 525, the exacting of exchange as a mere cover for usury is assumed, as a matter of course, to be usurious. In the case of *Oliver Lee & Co.'s Bank vs. Walbridge*, 19 N. Y., 134, the note was discounted in Buffalo, and made payable in New York city, the exchange being in favor of the latter place. It was averred by the defendants, and they offered to show, that the note was made payable in New York merely to enable the bank to obtain the amount of the exchange over and above legal interest. Justices COMSTOCK and ALLEN each delivered an opinion. The former held that it was not usury, for the reason that the law would not take notice of the difference in the value of money at different places in the same state, so as to impute usury to a contract made with a view to obtaining such difference beyond legal interest. But his reasoning would imply that a different rule would prevail between places in different states, particularly those as far distant from each other as New York and Wisconsin. Many of the reasons existing in the case of countries entirely foreign, exist in such a case. And our statute itself recognizes the distinction not only between contracts payable within this state and those payable without, but also between those payable in some adjoining state or territory and those payable in some state or territory not adjoining. It provides for ten per cent. damages in the latter case, on protested bills of exchange, but only five where payable in an adjoining state or territory. This statute does not include promissory notes, and perhaps the general law merchant would not entitle their holders in such

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cases to recover the difference of exchange, though there are some decisions that they may. See opinion of COMSTOCK, J., pages 136-7, where he alludes to the conflict of decisions upon this point, and admits that, in justice, promissory notes and bills of exchange ought to stand upon the same footing in this respect. This, therefore, is sufficient to take this case out of his reasoning, and to show that, as between Wisconsin and New York, the difference in exchange is a thing sufficiently tangible and real for the law to recognize it, and to make usurious any agreement made to recover it, over and above legal interest, when made as a mere shift for that purpose and not in good faith. And it may be observed that SELDEN and GRAY, Justices, dissented; and there is certainly much force in the reasoning of Justice JOHNSON, to the effect that such a transaction would be usurious even in New York. *Cuyler vs. Sanford*, 13 Barb., 347. Justice ALLEN also held that there was no usury, but upon different grounds. He seems to rely principally upon the uncertainty as to whether the exchange would be in favor of the place where the note was made payable, when it became due. He alludes also to the fact that this arrangement was not insisted on as a condition of the loan, and says, if that had been done, and the agreement to pay exchange had been expressed in the instrument, he was not prepared to say that it would not have been usury. Now in this case both of those things are alleged to have been done, so that there is nothing in either of the opinions in that case in conflict with the position that this answer discloses usury. And it may be observed, that there is nothing in the mere fact of the uncertainty as to whether the lender will eventually gain anything by way of exchange that deprives such a transaction of its usurious character. If he is sure, at all events, of his principal and interest, and stipulates even for a chance for more, it is usury. *Cleveland vs. Loder*, 7 Paige, 557, and cases cited; *Leavitt vs. De Launy*, 4 Coms., 369.

We are fully satisfied, therefore, that this answer sets up facts showing usury. And if it were not so held, it is obvious that not only the spirit but the letter of the usury laws would be entirely subverted. The lender might openly

contract for the payment of exchange on the most distant states, as California or Oregon, in addition to legal interest, exact the payment of it, and yet take no usury. This would be equivalent to a repeal of the law. See also *State Bank vs. Ensminger*, 7 Blackf., 105.

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It seems, from the opinion of the court below, that the demurrer to the answer was sustained, not because it failed to show a case of usury, but because it did not aver a tender of the principal sum loaned. And this is based upon the decision of this court in *Rock River Bank vs. Sherwood*, which is said to have decided that precise point. This is a misapprehension of that decision. In that case usury was not averred at all, but the bank, having contracted for usurious interest, it was claimed that the entire contract was void, not by the usury law, but for want of power on the part of the corporation to make it. It was said to be as void as would be a policy of insurance issued by the bank. On the other hand, it was contended, that, inasmuch as the bank was authorized to loan money and take securities, if it contracted for more interest than the law allowed, that had the same effect on the contract as would a similar transaction between individuals. And this court sustained the latter view. That was the entire scope of the decision. And that part of the opinion relied on by the court below, simply asserts that the defendant, in order to avail himself of the usury, should have plead it, and then have proved a tender. It does not hold, however, that he should have averred a tender. And this court has expressly decided, in several cases, that this was not necessary, even while the usury act of 1856 was in force. *Platt vs. Robinson*; *Root vs. Pinney*, not yet reported. But it was also held in the case last mentioned, that the provision in the act of 1856, in respect to proving a tender, (which had been re-enacted in the revision of 1858,) was repealed by the usury act of 1859. It was also held that it was a provision affecting the remedy merely, by imposing a condition which the courts should require to be complied with, before the party could have the benefit of his plea showing an illegality in the contract. And it was further held, as a consequence, that when the law imposing this

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condition was repealed, the party was at liberty to avail himself of that illegality, without complying with the condition. It was therefore erroneous for the court below to sustain the demurrer for want of an averment of tender in the answer. And under the law as it then was, and still remains, it was unnecessary for the defendants to prove it.

The order appealed from is reversed, with costs, and the cause remanded for further proceedings.

In the matter of the appeals of NEWLAND and DANIELS

Where an appeal, taken from an order of a county court, sitting as a court of probate, to a circuit court, has been heard by the latter on the merits, a judgment must be rendered therein, affirming or reversing, in whole or in part, the order appealed from, or making such other order as the county court ought to have made; and it is error for the circuit court to *dismiss* the appeal on the ground that no sufficient reason appears for reversing such order.

ERROR to the Circuit Court for Rock County.

The county court of Rock county, on petition of the administrator of one Sprague, ordered a sale of lands belonging to the estate of the deceased. From this order *Newland* and *Daniels* each appealed to the circuit court for that county, and that court made an order, in which, after stating that the cause had been brought on to trial, without a jury, by stipulation of the parties, and that the allegations and proofs of both parties had been duly heard and considered, and that it appeared that there were no sufficient grounds for reversing said order, it directed the appeal to be dismissed, with costs.

G. W. Foster, for plaintiffs in error, contended that in the trial of a case taken from the county court to the circuit court on appeal, the *reasons* assigned in the appeal are the *issues*; and that when the cause has been heard upon the merits, it cannot be *dismissed*, but must be determined by a judgment, affirming, reversing or modifying the order appealed from.

2. The order (so called) dismissing the appeal, being in fact a final adjudication of the rights of the parties, so far as that

court was concerned, was in reality a *judgment*, from which a writ of error properly lay, though not such a judgment as the law requires.

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H. K. Whiton, contra, contended that an order of the circuit court could not be brought up for review by a writ of error.

Other points raised by counsel on both sides, not having been passed upon by the court, are here omitted.

By the Court, PAINE, J. The order of the circuit court dismissing the appeal from the county court, must be reversed. Such an order would have been proper if the appeal from the county court had not been properly perfected. But it was not dismissed for that reason. On the contrary, there was a hearing on the merits, and the judge gives as a reason for dismissing the appeal, the fact that he found no sufficient reason for reversing the order. If that was so, then the order should have been affirmed, and not the appeal dismissed. R. S., 1849, chap. 85, § 34. The question has occurred to us, whether the appellant can be said to be aggrieved by this order, or whether he must be assumed to be in as good a position as he would have been in, if the order of the county court had been affirmed. If he were to let the matter rest there, it would be immaterial to him which order was made. But with respect to pursuing the litigation farther, we think the order dismissing the appeal places him in a wrong position. For he can hardly be held required or even authorized to make a bill of exceptions, presenting the whole merits of the appeal, for the mere purpose of determining whether it should be dismissed. The merits were immaterial for that purpose. And if his appeal was properly perfected, he was entitled to the judgment of the circuit court, either affirming or reversing the order appealed from, in whole or in part, or making such other order as the county court ought to have made. Then he could have sustained his rights by further appeal on the merits, if he saw fit.

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The order is reversed, with costs, and the cause remanded for further proceedings.

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The same order is made in the appeal of *Allen C. Daniels*, from a similar order of the circuit court in the same estate.

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CLAPP VS. UPSON, impleaded with STRICKLAND.

S. and U. had been partners in business as booksellers, in Mobile, Ala., under the name of "S. & Co.," but in the fall of 1856, their business in that place was broken up by violence, and they were compelled to leave the state, which facts were of public notoriety. Their partnership was thereupon dissolved, and public notice of the dissolution given. In the fall of 1857, S., who had then become engaged in the business of a bookseller at Milwaukee, in this state, which was conducted under the name of "S. & Co." (but in which U. had no interest), bought goods for that trade from a merchant in New York, giving therefor a note signed "S. & Co.," payable to the order of the plaintiff in this suit. The vendor of said goods had dealt with the firm of "S. & Co." at Mobile, during the years 1855-6, and although he had heard of the trouble in their business in that city, and supposed it was the reason why S. removed to Milwaukee, testified that at the time of the giving of the note sued upon, he had no knowledge that the firm of "S. & Co." in Mobile was dissolved, but supposed the firm in Milwaukee to be the same as it was in Mobile. The plaintiff was, in 1855, a member of a firm in New York, which had dealings with "S. & Co." at Mobile, and testified that he retired therefrom in 1856, and that at the time of taking said note he had received no notice of the dissolution of the firm of "S. & Co.," but had heard that they had been assailed by a mob in that city, and that their property was protected by the city authorities: *Held*, that the vendor was not justified in presuming that the firm of "S. & Co." at Milwaukee, was the same as the former firm of that name in Mobile, the distance between the places, and the other circumstances of the case, being sufficient to put him upon inquiry in that respect; and that the plaintiff could not recover against U. upon the note.

APPEAL from the Circuit Court for *Milwaukee County*.

Action by *Clapp* against *Upton* and *Strickland*, as partners, upon a promissory note executed in the name of "Strickland & Co.," and payable to the order of the plaintiff. *Strickland* suffered default, and *Upton* answered under oath denying his execution of said note, or that he was a partner of *Strickland* at the time when the note was executed. On the trial of this issue, the depositions of the plaintiff and one *Allen* were read in support of the action. *Allen* testified that he was a dealer in printers' cards, &c., in the city of New York, during the years 1855, '6 and '7; that he sold goods to the defendants during the years 1855 and '6,

at which period they were partners in the book and stationery business in Mobile, Alabama, under the name of "Strickland & Co.;" that he had not, at the time of the sale of the goods for which the note in suit was given, received notice of the dissolution of said firm; that he had heard of some difficulty at Mobile, growing out of the sale, by Strickland & Co., of abolition books, and supposed this was the reason why *Strickland* removed to Milwaukee; but that he had no knowledge of the breaking up of the firm of Strickland & Co. in Mobile; "that the note in this action was given for goods sold by the deponent to *Strickland*, in the name of Strickland & Co., while the purchaser was doing business in Milwaukee, to wit, on the 6th day of May, 1857, which goods were invoiced to Strickland & Co., as formerly when sent to Mobile, and that he then supposed the firm in Milwaukee to be the same as in Mobile."

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The deposition of the plaintiff stated that he was in the paper business in the city of New York, in the year 1855, as one of the firm of J. S. Derrickson & Co., and retired from said firm in 1856; that said firm did business with the firm of Strickland & Co., of Mobile, and that the deponent had received no notice of the dissolution of said last named firm previous to the making of said note; that he had been told that the said firm of Strickland & Co. was assailed by a mob, and that their property was protected by the city authorities, but not that the firm was broken up; and that he did not personally know the consideration of said note of Strickland & Co., payable to his order. The note, which was offered in evidence, was for \$220 51, was dated Nov. 7, 1857, and was payable to the order of the plaintiff at 12 months from date. The record states that several letters, signed Strickland & Co., and bearing date in the years 1855, '6 and '7, were read in evidence, to show the course of business between the defendants and said Allen, some of which were dated at Mobile and some at Milwaukee, and, among others, one enclosing the note upon which this action was brought, which was dated Milwaukee, Nov. 2, 1857, addressed to said Allen, and signed "Strickland & Co.," in which it is stated, "We enclose our note for \$220 51, as per your request."

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The defendant *Upson*, by his counsel, moved the court for a judgment of non-suit, which was refused, and the defendant excepted. On the part of the defense, it was proven that the said firm of Strickland & Co., composed of the defendants, *Strickland* and *Upson*, was dissolved at Mobile in the fall of the year 1856, of which fact public advertisement was made in a daily newspaper published in the city of Mobile, and by printed circulars; that previous to such dissolution the business of said firm was forcibly assailed and broken up and the parties compelled to leave the city; and that such forcible breaking up of said business was a matter of public notoriety in Mobile and elsewhere. It was also proven, that since such dissolution said *Strickland* and *Upson* had not been partners in business anywhere.

The court instructed the jury "that the said Allen, who sold the goods for which the note was given, as between him (Allen) and the defendant *Upson*, was entitled to actual notice of the dissolution of the firm of Strickland & Co., and that, in the absence of such actual notice, he could reasonably infer that the firm of Strickland & Co. in Milwaukee was one and the same with the Mobile firm, and would, in such case, be entitled to recover against *Upson*, in an action between them for the value of such goods; and that if the jury found that the note in this case, made by Strickland & Co. to the order of the plaintiff, was delivered to Allen in settlement of the bill of goods purchased of him by *Strickland*, under the name of Strickland & Co., subsequently to the dissolution of Strickland & Co. at Mobile, and that Allen had received no actual notice of such dissolution, then the plaintiff would be entitled to recover against the defendant *Upson*, in this action, and that the plaintiff, in his action upon said promissory note, is entitled to the same equities that said Allen would have been entitled to in an action by him against the said defendant upon an account, or upon a note given to himself for said goods." To these instructions the defendant excepted.

The defendant's counsel requested the court to instruct the jury as follows: "1. If the jury find that the plaintiff in this action seeks to recover against the defendant *Upson*, upon a

note made by the defendant *Strickland*, to the order of the plaintiff, after the firm of *Strickland & Co.* of Mobile had been in fact dissolved, and when *Upson* was not a partner with *Strickland*, and not in settlement of any bill of goods sold by the plaintiff to the defendant *Strickland*, or on account of any dealings between *them*, the plaintiff will not be entitled to a judgment against *Upson*. 2. If the jury find that *Allen* knew of the breaking up of the business of *Strickland & Co.*, in Mobile, this was in itself a sufficient circumstance to put the said *Allen* upon inquiry as to the continuance of the identical firm in Milwaukee; and having information of such violence in Mobile, he cannot presume that the Milwaukee firm is the same with the Mobile firm. There is no presumption applicable to this case, that the Milwaukee firm was the same as the Mobile firm; the distance and dissimilarity between the two forbid it." These instructions the court refused to give, and the defendant excepted.

Verdict against the defendant *Upson*. Motion for a new trial overruled, the defendant *Upson* excepting, and judgment upon the verdict.

Nelson Cross, for appellant:

The plaintiff, as an individual, had never had dealings with *Strickland & Co.*, of Mobile. Hence the *notice of dissolution*, published in the Mobile paper, is sufficient as to *him*. Coll. on Part., 311, 312, §§ 531, 532; *Lansing vs. Gaine*, 2 John., 303, 304; *Ketcham vs. Clark*, 6 id., 147; *Graves vs. Merry*, 6 Cow., 701; *National Bank vs. Norton*, 1 Hill, 578; *Mowatt vs. Howland*, 3 Day, 353. 2. The principle that after a partnership is dissolved, one partner, dealing with a person who has no notice of the dissolution, may bind his copartner, applies only to transactions in the usual course of business. *Whitman vs. Leonard*, 3 Pick., 177; *Bernard vs. Torrance*, 5 Gill & J., (Md.), 383. The transaction between *Allen* and *Strickland*, as to the making of this note is *unusual and extraordinary*. 3. As to a person entitled to actual notice of dissolution, under the rule, notice may be inferred from circumstances. *Mauldin vs. Bank*, 2 Ala., 505; *Coddington vs. Hunt*, 6 Hill, 595; *Irby vs. Vining*, 2 McCord, 379; *Whit-*

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man vs. Leonard, supra. The court therefore erred in refusing to give the jury the second instruction asked by the appellant. 4. The authority of one partner to bind another ceases upon the dissolution of the partnership, and the rule applies even to the case of a promissory note made in settlement of a partnership debt, by the partner authorized to make such settlement. *Draper vs. Bissel*, 3 McLean, 275; *Lockwood vs. Comstock*, 4 id., 383; *Lansing vs. Gaine*, 2 John, 300; *Lusk vs. Smith*, 8 Barb. (S. C.), 570; *Perrin vs. Keene*, 1 App., 355; *Woodworth vs. Downer*, 13 Vt., 522. He cannot even renew a partnership note, (*National Bank vs. Norton, supra*; *Galliot vs. Bank*, 1 McMullen, 209,) nor endorse the notes given to the firm, so as to bind the firm. *Sanford vs. Mickles*, 4 John, 226; *Parker vs. Macomber*, 18 Pick., 505. The exception to this rule is where the party taking such note is a creditor of the firm whose name is signed as maker, holding such relations to it as to be entitled to notice of its dissolution. The facts in this case do not bring it within the exception. The plaintiff in this action is not such a party. The peculiar rights and equities of such a party are not capable of being transferred to another.

E. Murriner, for respondent :

1. An ostensible partner retiring from a firm, must, if he would be released from liability for the subsequent transactions of the firm, with those who have dealt with such former firm, give actual notice of such retiring; and until such actual notice, the former partnership still exists as to all persons having previously so dealt. Coll. on Part., § 530, *et seq.*, and cases cited; Story on Part., § 334, and cases cited; *Ketchum vs. Clark*, 6 John., 144; *Kelley vs. Hurlburt*, 5 Cow., 534; *Vernon vs. Manhattan Co.*, 17 Wend., 524; *Same vs. Same*, 22 id., 183. To this rule there is but one exception, viz., when the dissolution is by operation of law. Coll. on Part., § 120, and cases; Story on Part., §§ 336, *et seq.* 2. A purchaser of a note executed in the partnership name by one of a firm, in the partnership business, after dissolution of the partnership, to a former dealer with the firm, without notice of the dissolution, may enforce it against all the partners,

even though such purchaser have notice of the dissolution at the time of purchase. *Graves vs. Merry*, 6 Cow., 701.

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By the Court, PAINE, J. We think the court below erred in applying to this case the general rule, that where a person known as a partner retires from the firm, he, notwithstanding that, remains liable to those who, having previously dealt with the firm, continue to deal with it without actual notice that he has left it. That rule is founded on the fact that those persons who continue to deal with the firm, do so upon the faith and credit of those whom they had known to constitute it, and that they have the right to assume that it remains the same, until they have some information to the contrary. Now it seems to us that the entire reason of this rule fails in this case, the facts of which are certainly of an extraordinary character. Strickland & Co. did business as booksellers at Mobile in Alabama. The defendant *Upson* was at that time a member of the firm. Their business was broken up by violence, and they were compelled to leave the state. These facts were notorious, and were known to the person selling the goods to recover, for which this suit was brought. The firm actually dissolved at the time, and *Upson* ceased to be a member of it, though notice of that fact was not brought home to Allen, who sold these goods. Subsequently *Strickland* came to Milwaukee, and it seems a new firm was established under the old style of "Strickland & Co., of which, however, *Upson* was not a member. Then these goods were sold to *Strickland* for the establishment in Milwaukee, and he gave a note in the firm name. Allen, the vendor, had previously dealt with Strickland & Co., in Alabama, and testified that he supposed it was composed of the same persons in Milwaukee. But the question is, had he a right to suppose so? Had he the same right to assume that to be the case, that one dealing with a firm under ordinary circumstances has, to assume that it remains composed of the same persons, until notified to the contrary? It seems to us not. Ordinarily there is nothing to suggest an inquiry to the dealer. Nothing has happened to indicate the probability that a change has taken place. Therefore the law gives

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him the right to assume that no change has taken place, and holds those responsible to him on whose credit he thus continues fairly to deal, until they notify him that they are no longer members. But here the whole case is different. The facts suggest at once to every mind the probability that the firm in Milwaukee may not be composed of the same persons as the firm in Mobile. It is not reasonable, therefore, for the dealer to assume that it is, and if he chooses to assume it, it should be at his own risk. Suppose Mobile had been destroyed by an earthquake, or by war, and *Strickland* had subsequently been found in California, or in London, in partnership with somebody, but with nothing in the firm name to indicate whom—could it be said that any previous dealer could, without inquiry, reasonably sell him goods on the credit of those who were members of the firm in Mobile? We think not. It would be unreasonable for him to do so. The facts before him would show that it was at least quite as probable that they were not members, as that they were. And if he then deals it should be at his own risk. We do not intend here to establish a rule applicable to any case where there may be slight circumstances tending perhaps to excite suspicion or suggest inquiry, or to any ordinary change in the place of doing business by a firm. But we do think that when, as in this case, the entire business of a partnership at its established location is broken up by violence, and one of the partners is found in a distant part of the world, doing business afterwards, under the same firm name it is true, but one which indicates none of the old members except himself, the presumption that it is the same firm ceases to be the natural and ordinary presumption, and those who deal with it as such without inquiry, ought not to bind men who do not belong to it.

The judgment, as against the appellant *Upson*, must be reversed, with costs, and a new trial awarded.

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A county court having civil jurisdiction, possesses the power to appoint a receiver, in a proper case, upon supplementary proceedings against a debtor, against whom a judgment has been rendered in such court.

Such a court has jurisdiction of all those equitable remedies which were formerly used merely in aid of a suit or judgment at law, and which, or substitutes for which, the Code has made a part of the remedy in every civil action.

Where a sheriff returned an execution "no property," after holding it forty days, but before its regular return day, and there appeared upon the execution, beneath such return, and of the same date, a direction from the plaintiff's counsel to the sheriff, in these words, "Return as above, after diligent search:" *Held*, that the return was a sufficient foundation for supplementary proceedings, there being nothing in such return to indicate a want of good faith in the effort to reach the debtor's property upon the execution.

Case of *Remington*, 7 Wis., 643, distinguished.

Where it appears upon supplementary proceedings, that the judgment debtor has property liable to execution sufficient to satisfy the judgment, the court has no authority to appoint a receiver.

A conveyed to B certain real estate, by an absolute deed, and B at the same time executed to A a bond, reciting that said real estate was conveyed as security for a loan of money, and binding himself to re-convey it upon the payment of the debt when it fell due; the deed and bond were recorded the day after their date, and the debt, though past due, remained unpaid: *Held*, that the bond was a good defeasance in law; that the two instruments constituted, in law, a mortgage of the property, and that A had an estate in such property, which was subject to sale on execution against him.

APPEAL from the County Court of *Milwaukee* County.

On the 7th of January, 1859, the defendants *Diedrich* and *Henry Upmann*, confessed judgment in the county court of Milwaukee county, in favor of the *Second Ward Bank*, for the sum of \$2,104. Execution was issued upon the judgment, January 29, 1859, and returned March 17, 1859, with the following indorsements: "Received Feb'y 1st, 1859, at 9 A. M. Filed March 17th, 1859." "Milwaukee county, ss. I certify that I could not find any property in my county, whereof to make the amount of this execution, or any part of it, belonging to the within named defendants, and return unsatisfied. March 16, 1859. A. J. LANGWORTHY, Sheriff, Mil. Co., Wis."—"Return after diligent search as above. March 16th, 1859. SMITH & SALOMON, Pl'ff's Attys." On the 23d

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of May, 1859, the plaintiff presented to the judge of said court an affidavit, which, after setting forth the entry and docketing of said judgment, and the issuing of execution thereon as aforesaid, alleged that the defendants were non-residents of this state, and that the sheriff had "returned the execution wholly unsatisfied," and that the judgment roll in the action was filed, &c. The county judge, on the same day, made an order, based upon this affidavit, directing the defendant *Diedrich* to appear before him on the next day, "to make discovery on oath concerning his property, &c." The defendant did not appear on that day, but, by virtue of a subsequent order made by said judge, was examined before a referee on the 29th of September, 1859, when he stated that he had held lot 11, block 10, in the 7th ward of the city of Milwaukee (on which was the Hotel Wettstein), in trust for his wife until her death, intestate, in June, 1858, and afterwards for her "favorite son," who was a minor; that his wife had bought the property in 1847, with her own money, without his knowledge or request, and while he was in Mexico; that his name was inserted as grantee in the deed, at her instance, without his knowledge; that there was no trust expressed in the deed, and that the buildings thereon had cost about \$20,000. The plaintiff's counsel offered in evidence certified copies of the following instruments:

1. A bond of Matthias Wegmann and wife, for the conveyance of said lot to *Diedrich Upmann*, dated May 10th, 1847.
2. A deed of said lot from said Matthias Wegmann and wife to *Diedrich Upmann*, not expressing any trust, dated April 20, 1849.
3. A warranty deed of same lot from *Diedrich Upmann* to one Tiffany, consideration \$3,000, dated November 17th, 1857, and recorded the next day.
4. A bond from said Tiffany to *Diedrich Upmann*, bearing even date with the deed, and recorded also on the next day. This bond recited the execution on that day, of said deed from *Diedrich Upmann* to Tiffany, as collateral security for a loan of \$3,000, to be paid at such time as said *Upmann* should elect, after six months and before one year from that date, with interest according to the tenor of a note for that sum, given by said *Upmann* to said Tiffany, and bound Tiffany in a penalty of

\$50,000 to re-convey the lot to said *Upmann*, upon payment of said note according to its tenor, or upon demand thereafter.

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Upon this and other evidence, not necessary to be here referred to, the judge of the county court, upon application at chambers, made an order appointing a receiver of the property of said *Diedrich*, by which, among other things, it was directed that all the title which said *Diedrich* had then, or had at the time of the service of the order to answer, in said lot No. 11, should be vested in said receiver, upon the execution by him of the bond, &c., in said order required, and that said receiver, after giving certain public notice, as directed by said order, should sell the right and title of said *Diedrich* in said lot at public auction, &c. From this order *Diedrich Upmann* appealed to the county court, at its regular term, where the order was affirmed, and from the order of affirmance appealed to this court.

Schurtz & Paine, for appellants, contended that the supplementary proceedings were of an equitable nature (7 Wis., 643; 2 Duer, 658; 4 Sandf., 718; 11 How. Pr., 528), and that the county court had no jurisdiction of them; that that court had not general equity jurisdiction before the enactment of the Code of 1857, and that the Code did not give it such jurisdiction; that if the Code left that question doubtful, Rev. Stat., p. 652, § 46, removed all doubt. It cannot be maintained that that section excludes jurisdiction of regular chancery suits only, and not of special equity proceedings. The law makes no such distinction. Besides, if any chancery suit would have been regular in this case, it was the old creditor's bill. An order for the examination of a judgment debtor is a substitute for a creditor's bill, and is, in its nature, a new suit. 2 Duer, 658. 2. The appellant's interest in the land in question might have been sold on execution. The bond and deed were executed simultaneously, and recorded, and constitute a *mortgage at law*. 2 Hilliard on Mort., 243; 1 id., 27, 376; 6 Blackf., 113; 8 id., 99; 3 id., 52; 6 Pick., 172; 1 Eng., 269; 8 id., 112; 7 Johns., 278; 4 id., 41; 6 id., 290; 3 Conn., 211; 2 Ohio, 224; 10 Iredell, 269; 1 id., 340; 4 id., 12; 8 Sumner, 474; 4 McC., 336; 3

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Day, 397; 1 id., 93; 9 N. H., 20; 3 Ham., 526; 8 Dana, 194; 11 Vt., 323; 21 id., 449; 7 Watts & S., 335; 1 Rob. (Va.), 148; 17 Serg. and R., 70; 7 Watts, 269, 404; 3 id., 188; 6 id., 405; 2 Mass., 495; 5 id., 116; 4 id., 569; 12 id., 463; 2 Cow., 324; 4 Kent, 141; 2 Johns. Ch., 191; 14 Wend., 63; 2 Met., 103; 6 id., 479; 13 Pick., 413; 15 id., 259; 18 id., 543; 8 Paige, 243; 2 Greenl. Cruise, 81 n.; 1 Vern., 7; 1 H. Bl., 119; 1 Clark, 166; Forr., 63; 10 Shepl., 234; 13 Ala., 246; 21 id., 92. This was the ancient form of mortgage. (1 H. Bl., 119; 1 Hill. on Mort., 18; 2 Ves., 219), and many modern conveyancers have adopted it. 1 Pow. Mort., 9, n. H.; 3 Md., 82; 1 Hill. on Mort., 18. If the deed is registered and the bond to reconvey not registered, the transaction constitutes not a legal but an equitable mortgage. 1 Hill. Mort., 85, and cases cited. R. S., 1858, p. 542, § 32; 7 Watts, 268. The usual form of a defeasance is that the deed shall be void on payment of the debt; but a provision that on payment the grantee shall reconvey, is equally effectual, especially if the condition recites that the conveyance is made as a security for money. 2 Mass., 497; 5 id., 116; 12 id., 463; 6 Blackf., 113; 7 Humph., 121, 431; 2 Yerg., 325; 1 Hill. Mort., 31; 2 John. Ch. R., 191; 2 Met., 103; 6 id., 479; 15 Pick., 261; 13 id., 413. In this state the legal title vests in the mortgagor until foreclosure. 7 Wis., 566. In those states where the fee is held to be in the mortgagee, whether before or after forfeiture, the mortgagor's interest can be sold on execution at law. 1 Day, 93; 3 id., 397; 3 Conn., 211; 5 id., 592; 1 N. H., 172; 1 South., 268; 15 Ohio, 735; 11 B. Mon., 21; 3 Cush., 296. In 6 Blackf., 113, it was held that a party who had executed a deed, and received a bond for the reconveyance of the land upon the payment of a debt, had an interest in the land which was subject to sale on execution. 3. No trust in favor of *Upmann's* wife or child could be interposed to defeat the plaintiff's execution, for the deed to *Upmann* shows no trust. 4. There was no such return by the sheriff as would entitle the plaintiff to institute supplementary proceedings. *In re Remington*, 7 Wis., 643. 5. A sale under the order of the county court would cut off all redemption. This was

a violation of the spirit, if not of the letter of our law, which favors redemption on judicial sales of land generally.

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Smith & Salomon, for respondent :

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1. The design of the proviso in sec. 45, chap. 117, R. S., 1858, was to prohibit the courts mentioned in that section, from entertaining original jurisdiction of chancery cases. It could not mean to prohibit those courts from entertaining such proceedings as are prescribed by statute in a case otherwise within their jurisdiction, although such proceedings were formerly had only in courts of equity. 2. The sheriff's return was sufficient. The most that can be made of the memorandum of the plaintiff's attorney, is a request that he would return the execution, after he had made diligent search, before the return day. Crocker on Sheriffs, §§ 422, 424; 5 How. Pr. R., 396. But even if the appellant had property subject to execution, he could not be heard in this action, to contradict the sheriff's return of *nulla bona*, but would have to resort to his action for a false return. Crocker on Shffs., § 44; 3 Wend., 202; 6 Wis., 232, 243; 2 Paige, 418. Nor can he raise an objection to the return on this appeal. If he thought the return wilfully false, he should have applied to the court below to set it aside, or sued for a false return. 20 Wend., 622; R. S., 1858, chap. 134, § 88. 3. The appellant's interest in the lot deeded to Tiffany was not subject to sale on execution. The legal title was in Tiffany. A court of equity would indeed consider the deed and bond together as a mortgage, and upon repayment of the money loaned, with interest, would compel Tiffany to reconvey the land. But the appellant's only remedy in a court of law would have been by a suit for the penalty, if he had paid the money within the time limited, and Tiffany had refused to reconvey (*Orton vs. Knab*, 3 Wis., 576); and even this legal remedy had been lost by the lapse of the time within which payment was to be made. The appellant had, therefore, nothing left but a *strict equity of redemption*, and such a mere equitable right is not subject to sale on execution. *Jackson vs. Parker*, 9 Cow., 78, 80, *et seq.*; *Bogart vs. Perry*, 1 John. Ch. R., 52. In the latter case, the equitable interest was coupled with possession, and the court held that

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it could not be sold on execution. That our statute means to subject to sale on execution only legal estates, appears from sec. 70, chap. 134, R. S., 1858, which provides that the grantee in a sheriff's deed shall be deemed vested with the legal estate from the time of sale, for the purpose of maintaining an action for an injury to such real estate. This would be impossible if the grantee had only acquired a title to an equitable interest. 4. The appellant, when examined under the supplementary proceedings, disclaimed any interest in the land, and claimed to hold it in trust. This shows the propriety of these proceedings to reach the property. *Sale vs. Lawson*, 4 Sandf., 718; *Todd vs. Crooke*, id., 694; *Lilienthal vs. Fellerman*, 11 How. Pr. R., 528; *Bloodgood vs. Clark*, 4 Paige, 574. And the appellant, having set up such a claim in his answer, which is to be considered in the light of an answer to a creditor's bill, (*In re Remington*, 7 Wis., 643; *Corning vs. Tucker*, 5 How. Pr. R., 16, 20), is estopped from now claiming that his interest should have been sold on execution.

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By the Court, PAINE, J. In this case a judgment was recovered in the county court of Milwaukee county, and an execution having been issued and returned *nulla bona*, supplemental proceedings were instituted before the judge of that court. The first question raised is, whether he had jurisdiction of those proceedings. Before the Code that court had no equitable jurisdiction. The Code did not profess to change the jurisdiction of courts, or to confer general equity jurisdiction on the county courts. And a subsequent law, sec. 46, chap. 117, R. S., 1858, provided that the county courts therein referred to, having civil jurisdiction, should not be held to have jurisdiction in cases which had theretofore been cognizable only in a court of equity, except so far as to enable them to hear and determine any equitable defense, &c. It is claimed that the proceedings supplemental to execution under the Code, are in substance the creditor's bill of the old equity system, and that therefore the provisions before referred to exclude the jurisdiction of the county judge. This conclusion might seem correct at first view, but

we think that upon careful examination it will appear incorrect. The argument by which it is arrived at, overlooks a distinction, which seems to us quite obvious, between such equitable remedies as might be regarded as entirely of an ancillary character, and were merely in aid of a suit at law, and those suits which were wholly of an equitable character. It must be conceded that in the latter class of suits, the county courts mentioned in the section above referred to, would not have jurisdiction, except as a defense to a legal action. That statute not only expressly excludes it, but there was nothing in the adoption of the Code from which an intention could clearly be derived to confer such jurisdiction. But the same argument does not hold good with respect to those equitable remedies which were merely in aid of a suit or judgment at law, and which, or substitutes for which, the Code has expressly adopted as a part of the remedy in every civil action. The result of such an enactment is, that the legal remedy is enlarged and completed. Those defects are supplied, which under the old system made it necessary to resort to equity to aid the proceeding at law. The necessity for any separate suit is abolished, and all the powers necessary for the complete adjudication of the rights of the parties and the execution of the judgment, are provided for in that series of proceedings which, under the Code, constitutes the remedy in a civil action. While we concede, therefore, that the Code did not confer on those county courts jurisdiction in independent equitable suits, yet we do think that it necessarily had the effect to confer upon them power to administer the entire remedy in those civil suits of which they have jurisdiction, though some parts of that remedy obtain the same objects formerly obtained by a resort to equitable aid.

This may be illustrated by reference to the power of compelling a discovery. Under the old practice this was obtained by a resort to equitable aid, but the Code abolished bills for a discovery, and, in their stead, allowed every party to a civil action to be examined by the adverse party. Now can it be supposed that in a civil action of which the county court of Milwaukee has jurisdiction, it could not compel such an examination, merely because it once had to be obtained by a bill

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in equity? On the contrary, it seems clear to us that it would have the power. So of the power to make an injunctive order in certain cases. The statute in respect to these powers has accomplished what grew up as a mere matter of practice in respect to new trials in actions at law. At one time it was necessary to resort to a court of equity to obtain a new trial. But the courts of law began to assume the power of granting new trials, and to exercise it with more and more liberality, until finally it became so fully established that a resort to equity was almost entirely superseded. Suppose this had not been done, but the practice had still remained to resort to a bill in equity to obtain a new trial. If then, the Code had provided that whenever a trial had been had, the party might apply to the court on motion for a new trial, could it be said that this could not be done in the county court? We think not, and that it is equally clear that the Code confers on those courts all the powers which it prescribes as a part of the remedy in a civil action. Such a result is entirely in harmony with its general scope and object, which was to establish a single, uniform system of practice, by which all courts might administer complete relief in such suits as they had jurisdiction of. That it was competent for the legislature to confer these powers on those courts there is no doubt. It is only a question of intent, and of this there would seem to be no room for doubt, except for the provision above referred to, in sec. 46, chap. 117, R. S. The statute which authorizes supplementary proceedings, says that the party shall be entitled to the order from the "*judge of the court*," or a county judge or a court commissioner," &c. The "*judge of the court*" clearly indicates the judge of the court where the judgment was rendered. And construing all the provisions of the statute upon the subject together, we think the proviso in section 46, chap. 117, was designed only to prevent those courts from having jurisdiction in independent equitable suits, and not to prevent them from exercising those powers which by the Code were made parts of the remedy in an action at law. It follows, therefore, that the judge of the county court had jurisdiction of these proceedings.

We think, also, that the affidavit on which the order for the examination of the judgment debtor was made, as well as the execution itself, showed a sufficient return to lay the foundation for supplementary proceedings. The return certifies that the officer "could find no property whereof to make the amount," &c. This includes both real and personal property, and is therefore not liable to the same objection as the return in the case of *Remington*, 7 Wis., 646, which included only personal property, leaving the implication that the defendant might have real property on which to levy. True, it was returned by direction of the plaintiff's attorneys. But this direction was not given until after the sheriff had held the execution more than forty days, and then they directed him to return it only after diligent search, and these proceedings were not commenced until after he would have been bound to return it by law. There is nothing in this, indicating a want of that good faith in attempting to reach the debtor's property by the ordinary legal process, which is required as a condition precedent to the party's right to institute supplementary proceedings. True, it turns out that the judgment debtor had an interest in certain real estate, but the counsel claimed, evidently in good faith, that this interest could not be reached by execution; and whether it could or not, was the principal question discussed here. The facts material to that question are these: *Upmann* was the owner of the property, and conveyed it as security for a loan of \$3,000, to George A. Tiffany. The conveyance was by an absolute warranty deed, but Tiffany executed at the same time to *Upmann* a bond in the penal sum of \$50,000—reciting that the land had been conveyed as security for the loan, and conditioned to reconvey on the payment of the amount loaned, with interest, &c. The counsel for the plaintiff conceded that this, in equity, would be a mere mortgage, but claimed that it would be so only in equity, and that it not being a legal mortgage, the interest of *Upmann* could not be sold on execution. But we have no doubt that these instruments, executed by the parties, should be considered a mortgage both at law and in equity. No doctrine is more familiar, than that several instruments, executed together, as

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parts of one transaction, are to be considered together in determining what was the agreement. And it has accordingly been held in a great number of cases, which are extensively cited by the appellant's counsel, that an absolute deed given and a defeasance taken back in a separate instrument, are just as much a mortgage as though the defeasance were in the deed itself. And the objection made here that the bond to reconvey is not technically a defeasance, inasmuch as it does not provide that on payment the deed should be void, has also been passed on, and it has been held that such a bond is a good and proper defeasance in law. *Ers- kine vs. Townsend*, 2 Mass., 497; *Watkins vs. Gregory*, 6 Blackf., 114; *Harrison vs. Trustees, &c.*, 12 Mass., 456; *Marden vs. Babcock et al.*, 2 Met., 103; *Waters vs. Randall*, 6 Met., 482. We are entirely satisfied with the reasoning of C. J. PARKER in the case first cited upon this point. In these and numerous other cases in all the courts of the country, such instruments are spoken of as mortgages—not equitable mortgages merely, but mortgages—which, in the absence of any qualifying words, must be intended to mean legal mortgages. Indeed in many of the cases they were legal actions, as in the case in 6 Blackf.; *Fridley vs. Hamilton*, 17 S. & R.; *Jaques vs. Weeks*, 7 Watts, 267. In the latter case, the court says that an absolute deed with a separate defeasance “is to be considered *in law* in the nature of a mortgage.” In all these cases we see no suggestion that such instruments amount merely to an equitable mortgage, nor do the elementary writers upon the subject use any such qualification. On the contrary the distinction between a legal and an equitable mortgage is of a different character, and is thus stated in 1 Hill on Mort., 451: “In addition to the actual conditional conveyance of land, *which constitutes a legal mortgage*, courts of equity have recognized certain other liens arising from the implied agreement of parties or the justice of the case, but not depending upon any express transfer of title. These are usually termed equitable mortgages.” We can see no reason, either on principle or authority, why the rights of the parties in the land should be held to be any different, where the mortgage is executed in two instruments, from what they

are where it is in one only. The intent and substance of the transaction is the same, though there may be a slight difference as to the manner in which the grantor is to become repossessed of the property. The two instruments being executed together as parts of one agreement, are in law but one agreement, and although the character of the instruments might be changed by recording one and not the other, yet where both are recorded, as in this case, their character is fixed, and it is notice to everybody that it is but a mortgage. We must hold, therefore, that the grantee had only the rights of a mortgagee, and the grantor had all the rights of a mortgagor, and consequently that his interest might have been sold on execution.

And as it appears that the interest of *Upmann* in the property was probably ample to pay the debt, and his title being clear, inasmuch as the parol trust of which he testified was void, we think a receiver should not have been appointed, but that an order should have been made staying proceedings, that the plaintiff might sue out a new execution and sell the property thereon. 4 Sandf, 718; 4 Paige, 574; 11 How. Pr. R., 528. This would leave the debtor the time for redemption which the statute provides. This, we think, ought not to be cut off in a case like this, and though it might possibly be preserved by an appropriate order on a sale by a receiver, yet it will probably be less liable to mistake and uncertainty if the manner prescribed by statute for sales on execution is observed.

The order appealed from must be reversed, with costs, and the cause remanded.

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The state is not liable for services of attorneys who were employed by the school land commissioners, to defend suits brought against them in their official character in the supreme court.

It is the duty of the attorney general to defend such suits against those commissioners, when the interests of the school funds are involved therein, and in case of his sickness or absence, or where he is adversely interested, the governor is required by the statute to employ counsel to act in his stead.

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This action was instituted in this court, by *M. H. Orton* and *Geo. E. Bryant*, under the statute concerning "actions against the state," to recover for services as attorneys in defending certain actions brought against the school land commissioners in this court. The case is stated sufficiently in the opinion of the court.

October 15.

By the Court, COLE, J. This is an action to recover the value of certain legal services alleged to have been performed by the plaintiffs for and on behalf of the state. They state, in substance, in the complaint, that they were employed in the year 1857, by the then school land commissioners, to defend certain suits therein mentioned, commenced and prosecuted against such commissioners in their official character. The attorney general has demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. And we have, therefore, to determine whether the school land commissioners had any authority to employ counsel to defend suits commenced against them, and render the state liable for such services. We have been referred to no provision of law giving them that authority, and we know of none. And the doctrine is well settled that public agents can bind the government only when acting within the scope of their authority. But it was insisted upon the argument, by the counsel for the complainants, that as the school land commissioners were the agents of the state, to sell and dispose of the school and university lands, and to manage the school funds generally, as incident to their general powers and duties over these matters, it was absolutely essential that they should have, and that as a matter of law they did have, the power to retain counsel to defend suits commenced against them, and bind the state for such services; and that unless this power were conceded to them, they would either become personally liable for the employment of counsel, or would neglect to make any defense whatever, to the great prejudice of the interests of the state, and of the school funds. We do not think that any of these consequences are likely to follow from our denying the commissioners the power to employ

counsel and bind the state therefor. The statute makes it the duty of the attorney general to appear for the state, and to prosecute and defend all suits and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party; and also, when requested by the governor, or either branch of the legislature, to appear for the people of this state and prosecute or defend, in any other court, or before any officer, in any cause or matter, civil or criminal, in which the people of the state may be a party or interested. Sec. 36, chap. 9, R. S., 1849; R. S., 1858, sec. 50, chap. 10. The attorney general is the law officer of the government, elected for the purpose of prosecuting and defending all suits for or against the state, and it is clearly his duty to defend suits commenced against the school land commissioners, when the interests of the school lands, or school funds, are in any wise involved. Many suits are commenced against the commissioners, which do not at all concern the state, but where the commissioners are made nominal parties to the record to enable private persons to litigate some claim. In such litigation, of course, the people have no sort of interest. But in all suits where the people are interested, it is made the duty of the attorney general to appear and prosecute or defend, as the case may require. And being elected as the law officer of the state, on account of his peculiar fitness and qualifications for the position, we are not to presume that he will not be fully competent to protect and guard the interests and rights of the people.

Furthermore, the legislature have also provided that the governor, whenever he shall receive notice of the commencement of any suit or proceeding between other parties, by which the rights, interests or property of the state shall be liable to be injuriously affected, shall inform the attorney general thereof, and require him to make every legal and equitable defense against such suit or proceeding; and in any such case, or in any suit prosecuted or defended in behalf of the State, if the public interests require, the governor is authorized and required to employ such counsel as he may deem proper, to assist the attorney general, or in case of the sickness or absence of the attorney general, or when he may

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June Term, 1860. *be interested adversely to the state, to employ counsel to act in his stead. Sec. 2, chap. 9, R. S., 1849; sec. 2, chap. 10, R. S., 1858. These provisions of law clearly show that the legislature did not intend to give the school land commissioners authority to employ counsel for the state. That authority is plainly and distinctly given to another officer of the government, who alone can exercise it, and render the state liable to pay for legal services rendered.*

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The demurrer to the complaint must be sustained.

RACINE COUNTY BANK VS. AYERS.

A subscription for stock of a railroad company is not invalid merely because it is conditional, if the condition itself is not of such a character as to make the agreement void on the ground of public policy.

Such a subscription is not invalid because made payable upon condition of the location of a depot of the road in a particular part of a town through which the road is to pass.

Such a subscription is not invalid because it contains a stipulation on the part of the company that the amount paid thereon shall bear interest until dividends shall be declared from the earnings of the road.

A subscription for railroad stock made on the 5th of July, 1855, contained a stipulation that the subscriber might forfeit his stock after paying one-third of the amount subscribed, provided notice of his intention to forfeit should be given to the company prior to the 1st of July, 1855. *Held*, that such notice being impossible, the condition really never existed.

Where a contract is made with a corporation by a wrong name, a suit may be maintained thereon by an assignee of the contract, the complaint alleging that the contract was made with the corporation by such wrong name.

A railroad company may assign a stock subscription, or the amount due or to become due thereon.

ERROR to the Circuit Court for *Racine County*.

This action was brought to recover the amount of a railroad stock subscription. The complaint alleged that "The Racine, Janesville & Mississippi Railroad Company" was incorporated by an act approved April 7, 1852; that its name was changed to "The Racine & Mississippi Railroad Company" by an act approved March 31, 1855; that on the 5th of July, 1855, said Racine & Mississippi Railroad Company had divers shares of its stock to sell, and on that day the defendant

agreed with said company, by the name of "The Racine, Janesville & Mississippi Railroad Company," to purchase ten shares of said stock, upon the terms stated in the following agreement: "We severally agree to take the number of shares set opposite our names respectively, in the capital stock of the Racine, Janesville & Mississippi Railroad Company, and to pay therefor \$100 for each share of stock, in such sums and at such times as the board of directors of said company may from time to time direct; provided, 1. That not more than one-fourth of the amount subscribed shall be called for before the 1st of July, 1856, nor more than three-fourths before the 1st of July, 1858. 2. That each subscriber shall have the privilege of forfeiting the stock by him subscribed, and being released from any further payment thereon, after having paid one-third of the amount thereof; provided, that previous to the 1st day of July, 1855, he shall give written notice to the company of his intention to forfeit. It is further stipulated, that the amount paid on the stock hereby subscribed, shall bear interest at 10 per cent. per annum, until dividends shall be declared from the earnings of said road, provided the installments are paid when called for as aforesaid; provided, that the depot in Burlington on said railroad is located by said company not further east than the east line of lands owned by Joseph Fey in said town of Burlington." The complaint alleged that said Racine & Mississippi Railroad Company accepted and ratified said agreement, and entered the name of the defendant on its books as a subscriber for ten shares of its capital stock, and had ever since held, and still held, said ten shares ready for the defendant upon his making payment therefor; that said company, before the 2d of November, 1855, located their depot at Burlington, west of the east line of the land of Joseph Fey, in said agreement referred to; that various calls had been made by said board of directors, for the payment of installments upon said stock, under which the whole sum subscribed by the defendant had become due and payable; that the defendant had never paid one-third of the sum so subscribed by him, or forfeited his said stock, or given any notice to said company of his intention to forfeit it; that said Racine

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JUNE TERM, & Mississippi Railroad Company, on the 27th of July, 1858,
1860. for a valuable consideration, made a written assignment of
RACINE COUNTY BANK said subscription, and of all moneys due, or to grow due
v. thereon, to one Isaac Taylor, of which the defendant had
ATLANTA. due notice; and that, on the 9th of June, 1859, said Taylor,
 for a valuable consideration, assigned said subscription to
 the plaintiff, which is a body corporate under the banking
 law of this state.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and specified the following objections: "1. The agreement set forth in said complaint does not purport to be entered into with the Racine and Mississippi Railroad Co., nor is it stated that the same was drawn by mistake, misreciting the name of the railroad company. 2. The said pretended agreement was to take shares in the capital stock of the Racine, Janesville and Mississippi Railroad Co., whereas, on the day said agreement was alleged to have been executed, there was no such corporation, nor any incorporated company authorized to build a road which should touch Racine, Janesville, and the Mississippi river, and therefore the contract was void for uncertainty. 3. The said agreement was one which the Racine and Mississippi Railroad Company had no right to make. (1). Because it was an agreement to sell shares of its capital stock for a certain price, and not a subscription to its capital stock. (2). Because it stipulated that the subscription should be called for in a manner not provided by law, and was a fraud upon cash-paying stockholders. (3). Because the company could not agree to let a stockholder forfeit his stock, without full payment therefor, and such a subscription was contrary to the charter of said company. (4). Because it stipulated for the payment of interest, contrary to the terms of the company's charter. (5). Because the company had no right to accept a subscription conditioned upon any future location of its depot at Burlington. 4. It is not alleged in the complaint that any shares of the capital stock of any railroad company were tendered to the defendant before action brought.

Judgment for the defendant on the demurrer.

Cary & Pratt, for plaintiff in error :

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1. A party may contract in such name as he pleases, but a suit to enforce such contract must be in his proper name, and when it satisfactorily appears that it is his contract, he can recover. *Templeton vs. Crow*, 5 Greenl., 417; *N. Y. Afr. Soc. vs. Varick*, 13 Johns., 38; *Medway Cotton Man. vs. Adams*, 10 Mass., 360; *Pres., Managers &c. vs. Myers*, 6 Serg. & Rawle, 12; *Ang. & Ames on Corp.*, § 234. 2. The agreement sued upon is one that the railroad company had a right to make. (1). It was competent for the company to agree that any subscriber might forfeit his stock after paying one-third of the amount thereof. Its forfeiture when partly paid for was beneficial to the company. Such a stipulation, therefore, could not work a fraud upon any one. *New Bedford and Bridgewater T. Co., vs. Adams*, 8 Mass., 138. But in this case the defendant could avail himself of this pretended condition only by giving notice in writing of his intention to do so, before the 1st of July, 1855, a day prior to the date of the agreement. The condition therefore did not exist. *Merrill vs. Bell*, 6 Smedes & Marsh., 730; *Hughes vs. Edwards*, 9 Wheat., 489, 493-4. (2). The company was at liberty to allow interest on money paid on stock, from the time of its payment. (3). The condition in regard to the location of the depot at Burlington is one which the company was at liberty to make, in receiving a subscription, after it was fully organized. In some cases in New York such subscriptions have been held to be contrary to public policy; but in this position the courts of that state stand alone. *Cumberland Valley R. R. Co. vs. Baab*, 9 Watts, 458; *Rhey vs. Ev. & S. Pl. R. Co.*, 27 Penn. St., 261; *McMillan vs. M. & L. R. R. Co.*, 15 B. Mon., 218; *H. & N. R. R. Co. vs. Leavell*, 16 B. Mon., 358; *Chapman vs. Mad R. & L. Erie R. R. Co.*, 6 Ohio St., 118; *Carlisle vs. Terre Haute & Richmond R. R. Co.*, 6 Ind., 316; *Fisher vs. E. & C. R. R. Co.*, 7 id., 407; *Central T. Co. vs. Valentine*, 10 Pick., 142; *Troy & Greenfield R. R. Co. vs. Newton*, 1 Gray, 544; *N. H. Central R. R. vs. Johnson*, 10 Foster, 401; *Pierce on Am. R. R. Law*, 70, 71. 3. The conditions were all for the protection of the defendant, and if any of them were void or contrary to public

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policy, it would avoid the condition and dispense with its performance, leaving the obligation of the stock subscriber in full force. *Henry vs. V. & A. R. R. Co.*, 17 Ohio, 187.

4. It was not proper for the company to deliver the stock to the defendant before payment in full of his subscription. He could at any time compel a delivery by such payment.

C. E. Dyer and Mat. H. Carpenter, for defendant in error:

1. Delivery of the shares of stock subscribed for and payment therefor, are, by this contract, made concurrent acts. There ought therefore to have been averred in the complaint a tender of such shares before action brought. *Dana vs. King*, 2 Pick., 156; *Lester vs. Jewett*, 12 Barb. (S. C.), 502; *Same Case*, 1 Kern., 453; *Bank of Columbia vs. Hagner*, 1 Peters, 455. 2. The company had no power to enter into the agreement upon which suit is brought. The powers of corporations must be strictly construed. 2 Cranch, 127; 4 id., 542; 2 Kent's Comm., 298; *Beatty vs. Marine Ins. Co.*, 2 John., 109; *People vs. Utica Ins. Co.*, 15 id., 358; 7 Wis., 59. Counsel insisted on the several objections to the agreement, which were specified in the demurrer, citing in support of the objection that it was an agreement for the sale of, and not a subscription to, the capital stock of the company, secs. 1 and 2 of its charter, and *Troy & Boston R. R. Co. vs. Tibbits*, 18 Barb. (S. C.), 297; to the point that the company could not stipulate for a forfeiture of the stock at the will of the subscriber after payment of one-third of the amount thereof, *Slee vs. Bloom*, 19 John., 456; to the point that the company could not stipulate with any stock subscriber for the payment of interest on the amount paid in upon his stock, without a fraud upon the other stockholders, *Troy & B. R. R. Co. vs. Tibbits*, *supra*; *Wood vs. Dummer*, 3 Mason, 308; Redfield on Railways, pp. 99, 597; and to the point that the company could not take a subscription conditioned upon any future location of its depot at Burlington, *Butternuts & Oxford R. R. Co. vs. North*, 1 Hill, 518; *M. & B. Pl. R. Co. vs. Snediker*, 18 Barb., 317; *Fort Edward & Ft. Miller Pl. R. Co. vs. Payne*, 1 Smith, 583; *Fuller vs. Dame*, 18 Pick., 472.

By the Court, PAINE, J. Most of the questions presented in this case have already been determined by this court. The validity of conditional stock subscriptions, was assumed by the court in the case of *The Fox River Valley Railroad Co. vs. Shoyer*, 7 Wis., 365; and it was expressly sustained in the case of *The Milwaukee and N. I. R. R. Co. vs. Field*, argued at the last term. Undoubtedly there might be a condition annexed to such a subscription, which, from its peculiar character, might make the agreement void, as against public policy. But if the condition itself has no such character, the mere fact that there is a condition, does not invalidate the agreement. It is true, that in New York it has been held that a subscription, conditioned upon a certain location of the road, is void, as against public policy; it being supposed to introduce motives of private interest to control the location, instead of leaving it to be determined as public convenience might require. But this doctrine has not been adopted in other states. On the contrary, their courts have held such subscriptions valid. See *Pierce on Am. R. R. Law*, pp. 70, 71, and cases there cited. And after carefully considering the question, we are of the opinion that those courts have taken a correct view of the law. The charters of these companies impose such restrictions and requirements upon them as, in the opinion of the legislature, the public interest and public policy demand. And it having done so, it must be assumed that within these limits the company is left to accomplish the enterprise as best it may. And the mere fact that in some agreement it may appear that motives of private interest, may, to some extent, operate in influencing its action, ought not to be held to make such agreement void, as against public policy. It is vain to suppose that such enterprises can be accomplished without the operation of such motives. They constitute the mainspring of human action, and must inevitably operate to a greater or less extent, in the execution of all great enterprises of this character, and we think it may be safely assumed that so long as the company complies with the requirements of the charter, the struggle between conflicting private and local interests will, from the

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necessity of the case, be so adjusted as best to advance the enterprise and accommodate the public generally.

The power of the company to contract for the payment of interest on advance payments for stock, was also sustained in the case of *R. R. Co. vs. Field*; and the assignability of stock subscriptions, in the cases of *Downie vs. Hoover*, *Downie vs. Page* and *Downie vs. White*, at the last term.

The only other points presented here are the following: It is said that this agreement does not purport to be made with the Racine & Mississippi R. R. Co., and that there is no allegation of any mistake, and that therefore this action cannot be sustained. This objection might be good, if it could be assumed that the Racine & Mississippi R. R. Co. was one corporation, and the Racine, Janesville & Mississippi R. R. Co. another. But this, in view of the allegations in the complaint, cannot be assumed. On the contrary, the complaint expressly avers that the name of the corporation was changed from the latter to the former, at about the time of making this agreement, and that it was made with this corporation by its old name. If this allegation was true, the misnomer would not defeat an action on the contract. *Templeton vs. Craw*, 5 Greenl., 417; 13 John., 38; 10 Mass., 360; 6 Serg. & Rawle, 12; Ang. & Ames on Corp., § 234.

The question whether it was competent for the company to agree that the subscriber might forfeit his stock, after paying one-third, does not seem to be fairly presented on this demurrer. For the agreement is dated on the 5th of July, 1855, and by its terms he was required, in order to avail himself of that condition, to give notice previous to the 1st of July, 1855, of his intention to forfeit. This was impossible, and the condition, therefore, never really existed. *Merrill vs. Bell*, 6 Smedes & Marsh., 730; *Hughes vs. Edwards*, 9 Wheat., 493-4.

The judgment must be reversed, with costs, and the cause remanded for further proceedings.

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The objection that one of the grand jurors who found an indictment, was an alien, cannot be taken advantage of after a plea to the merits, although the disqualification was not known to the defendant until after such plea was filed.

The words "any person not having all the qualifications of an elector," as used in sec. 42, chap. 169, R. S., 1858, mean any person *disqualified, incapacitated or disentitled to vote*, from any of the causes fixed by law, and refer to the condition of the person at the time his vote is received.

It is not necessary, in an indictment against inspectors of an election, under the above section, to aver that the person from whom the vote was received, did not take the oath prescribed by sec. 36 of chap. 7.

A count in an indictment charging that the inspectors of an election did knowingly receive, and sanction the reception of, an illegal vote, is not objectionable for duplicity. Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense.

Whether a person offering to vote has a wager depending upon the result of the election, is a mixed question of law and fact, in passing upon which the inspectors act in a *quasi* judicial capacity, and if they discharge that duty in good faith to the best of their ability, they are not criminally responsible for an error of judgment or mistake of law.

ERROR to the Circuit Court for *Dane* County.

Indictment against *Byrne* and *Kinney*, as inspectors at a general election in the city of Madison, for knowingly receiving and sanctioning the reception of an illegal vote. The first count charges that the defendants did, as inspectors of said election, unlawfully and knowingly receive, and sanction the reception of, a vote from one *Pierce*, he not having all the qualifications of an elector at such election, and being then and there disqualified as an elector, for the reason that he had made certain bets and wagers, which were then depending upon the result of said election, the defendants then and there well knowing that the said *Pierce* had not all the qualifications of an elector at said election, and that he was then and there disqualified as such elector, and that he had bets and wagers depending on the result of said election. The second count was in substance similar to the first; the third count charged that the defendants did, as such inspectors, unlawfully and knowingly receive the vote of one *Pierce*, he not having all the qualifications of an elector at

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such election, the defendants then and there well knowing that the said Pierce had not all the qualifications of an elector at such election. The fourth count is similar to the first, except that it names one of the persons with whom said Pierce had made bets which were depending upon the result of said election.

A motion was made to quash the indictment, for the following reasons: 1. The statute under which the indictment is found, does not create or describe the offenses charged therein. 2. The first, second and fourth counts in the indictment, each charge two separate and distinct offenses. 3. The indictment contains no averment of the criminal intent of said defendants, nor are the offenses alleged with sufficient certainty and particularity. 4. There is no sufficient averment that Pierce lacked any one of the qualifications of an elector; that he bet any thing, or was interested in any bet depending upon the result of the election. 5. The defendants should not have been joined in the indictment. 6. Said indictment is in other respects informal, uncertain and insufficient.

The motion was overruled.

On the trial it was proved, among other things, that Pierce offered his vote to the inspectors before noon of the day of election, and the vote being challenged, he was sworn, and stated that he had made bets and had bets then pending upon the result of the election, for which reason his vote was rejected. About the middle of the afternoon, Pierce again offered his vote, and, under the oath which he had previously taken, stated to the inspectors that he had withdrawn all his bets but one, and that had been made with one C., who had gone out of town, and therefore he could not find him in order to withdraw it. Being asked by the inspectors if he had put up the money upon that bet, he answered that he had not. The defendants were not lawyers; the other inspector, J. G. Knapp, was a lawyer. Several of the witnesses testified that after Pierce stated that there was no money up, Mr. Knapp said, "I don't know why he cannot vote." One witness testified that Mr. Knapp said to the board, "Unless the stakes were up, there is no bet;" that Kinney held the

vote in his fingers, and looking to Knapp said, "Shall we receive the vote?" and that *Byrne* asked him, "What shall we do with this vote?" and that Knapp replied, "I don't consider that there is a bet unless the stakes are up." This evidence as to the inquiries made by the defendants of Mr. Knapp, concerning the legality of the vote, and as to his reply, was, however, contradicted by other witnesses.

The defendants' counsel requested the court to instruct the jury as follows: "1. Unless the jury shall find that Pierce lacked one or more of the qualifications of an elector mentioned in sec. 1, chap. 7, R. S., the defendants must be acquitted. 2. The maxim that ignorance of the law excuseth no man, applies to acts which are voluntary, and not to acts done by a person in an official capacity, which he is required by law to do, and in doing which he is to exercise a judgment. In these cases he is innocent, unless he acts from a corrupt motive. 3. A criminal intent is an essential element in every crime, and in determining the question the jury will consider the conduct of the defendants, and what they said and did at the time Pierce applied to vote, and at the time his vote was received." The two first of these instructions the court refused to give, the defendants excepting to the refusal, and gave the third, subject to the qualifications contained in its general charge to the jury, which was as follows: "The statute is, 'If any inspector of elections shall knowingly receive, or sanction the reception of, a vote from any person not having all the qualifications of an elector,' &c. The word "knowingly" used in this statute means guilty knowledge, that is knowing the facts—knowing such facts as make the elector disqualified. It does not mean knowing the law; for in this offense, as in all others, the defendants are presumed to know the law, and ignorance of the law, even if proved, would be no excuse. If you find that the defendants received the vote, knowing the facts which disqualified the elector, it makes no difference whether they knew the law or not; they are guilty. And if they did the act knowingly (in the language of the statute, and in the sense which I have defined), no other intent need be shown to complete the offense. The intent with which they received the vote

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was immaterial. The word "knowingly," as used in the statute, imports a guilty knowledge, and if you find that they did thus knowingly receive the vote, they are guilty. The defendants are presumed to have known what facts constituted such a bet as disqualified the elector. To complete such a bet, it was not necessary that any stakes should be put up. A promise to pay was sufficient." To all of said instruction the defendants excepted. The jury found the defendants guilty. A motion for a new trial was made, upon the grounds that the verdict was contrary to law and to the evidence; that the judge erred in his instructions to the jury; that the indictment was not found and presented by a lawful grand jury; and that the verdict was not found by a lawful jury, in this, that one or more of the members of said jury were not, at the time, citizens of the United States. In support of this motion, the defendants produced the affidavits of one of the grand jurors who found said indictment, and one of the petit jurors who tried said cause, showing that they were not, at the time of the finding of said indictment, and of said trial, citizens of the United States; and filed their own affidavit, showing that they did not know of the disqualification of said grand juror or of said petit juror, until after the verdict of the jury was rendered in this case. The court overruled the motion, and the defendants excepted. A motion in arrest of judgment was also made, for the reasons assigned upon the motion to quash the indictment, which motion was overruled, the defendants excepting, and judgment rendered upon the verdict.

Samuel Crawford and J. P. Atwood, for plaintiffs in error:

1. The disqualification of the grand juror was available on a motion in arrest of judgment. 6 Wend., 386; 36 Me., 128; 2 N. H., 349; 7 English, 630; 7 Yerger, 271; 12 Tex., 252; 9 id., 65; 11 id., 261; 1 Chitty's Cr. Law, 307; Wharton's Am. Cr. Law, 121-2; 1 Gratt., 556; 2 Hale, 155. 2. The crime defined by the statute under which the indictment was found, is that of receiving, &c., "a vote from any person *not having all the qualifications of an elector.*" The qualifications of an elector are defined in sec. 1, Art. 3 of the constitution. Pierce had them all, even though deprived by statute

of the *right to vote at that election*. 3. The inspectors were *obliged* to receive Pierce's vote, if at the time of voting he answered satisfactorily all the questions put to him by the inspectors, and took all the oaths required, particularly that prescribed in sec. 36, ch. 7, R. S., and the indictment is defective in failing to allege that he did not do so. 1 Chitty's Cr. Law, 284; Archbold's Cr. Pl., 64; 1 Starkie's Cr. Law (2 ed.), 219; *State vs. Barker*, 18 Vt., 185; *State vs. Butler*, 17 id., 149; *Com. vs. Thurlow*, 24 Pick., 379; *Crandall vs. The State*, 10 Conn., 339. 4. The 1st, 2d and 4th counts each charge two distinct offenses—the receiving of the vote and the sanctioning of its reception, and are bad for duplicity. The 3d charges both the defendants with *receiving* the vote, whereas only one should have been indicted for receiving and the other for sanctioning. The verdict was general. 5. Inspectors of election act judicially in receiving or rejecting votes, and cannot be held civilly, much less criminally, liable for errors of judgment. In support of this position counsel cited 3 Jones, 339; 1 Mod., 184; 2 Doug., 426, 465; 1 Day's Cases, 315; 2 Caines' Cases, 314; 11 John., 83, 114, 150; 15 id., 282; 18 id., 119; 1 Denio, 214, 601; 3 id., 117; 21 Barb., 207; 24 id., 422; 2 McLean, 19; 3 id., 574, and numerous other cases.

S. U. Pinney, on the same side, cited in support of the point last mentioned, 1 Term Rep., 653; 41 E. C. L., 280; 66 id., 289; 2 Leigh, 715; 1 Mass., 227; 15 Wend., 277; Bro. Parl. Cas., 49; 2 Bay, 1; *Com. vs. Aglar*, Thacher's Crim. Cases; 9 Met., 263, and numerous other cases.

J. H. Howe, attorney general, for the state.

By the Court, DIXON, C. J. None of the authorities cited by the counsel for the plaintiffs in error sustain the position that, where knowledge of the disqualification of any of the grand jurors by whom the indictment was preferred, does not come to the accused until after the trial and verdict, he may then avail himself of such defect by motion in arrest of judgment. Whilst in some of the states it is held that objections like the present, which do not go to the character of the juror, but are strictly legal and technical in their na-

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ture, can only be taken by way of challenge and before the indictment is returned and filed (3 Wend., 314; 6 id., 386; 9 Mass., 107), and in others that they may be plead in abatement (1 Grat., 556; 7 Eng., 630; 7 Yerg., 271; 12 Texas, 252), and in others still that they may be shown by motion at the time the defendant is arraigned (4 Greenleaf, 439; 36 Maine, 128), it is agreed in all that they cannot be listened to after a plea to the merits. The delays and inconveniences in the administration of criminal justice which would follow from the adoption of a different rule, would be immense, and the ends of substantial justice would not be in the least promoted by it. There was therefore no error in the ruling upon this point.

In giving a construction to the statute under which the indictment was found, we cannot adopt the distinction made by counsel between the positive and negative qualities of the voter, or those things which under the constitution and laws are said to give, and those which are said to take away from the individual, the elective franchise. We cannot for a moment believe that the legislature, in framing and passing the statute, contemplated or intended to recognize such a distinction. On the contrary it seems to us plain that the word "qualifications" was not used in the limited sense in which it occurs in the constitution, but with reference to its more enlarged meaning when all the laws touching the privilege of the party offering to vote were applied to the facts of the case. Violations of the laws with respect to those things which are necessary to confer, and those which are declared to destroy the privilege where it once existed, are equally within the mischiefs which the act was designed to prevent; and the restriction of its operation to cases of the first class would manifestly defeat the intention of the legislature. The language used, when understood according to its ordinary grammatical signification, is broad enough to cover both. The words "any person not having all the qualifications of an elector" are equivalent in their effect and meaning to the words *any person disqualified, incapacitated or disentitled, from any of the causes fixed by law*, and refer of course to the state or condition of the person at the time his vote is received.

The case made by the testimony is therefore within the provisions of the statute. June Term,
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It was not necessary to state in the indictment that the person from whom the vote was received did not take the oath prescribed by section 36, of chapter 7 of the Revised Statutes. The rule seems to be universal that where the exception is in a separate section of the statute, or in a proviso which is distinct from the enacting clause, it then becomes a matter of defense which the prosecution need not anticipate or notice. In order to become material for him to negative, it must be contained in and form a part of the enacting clause itself. Here the enacting clause, so far as the offense charged is concerned, is the first division of section 42, chapter 169, and the exception is found in section 39 of chap. 7. No direct reference is made in the enacting clause to section 39 or any other part of chapter 7, nor is the same or any part of it incorporated into it. It is true that we are obliged to look to chapter 7 to ascertain when an offense has been committed, and the defendants, in a proper case, might be compelled to rely on its provisions to confirm their innocence; but this does not make that chapter a part of the enacting clause, as was contended by counsel. Counsel referred, and very properly, to the provisions of the constitution to ascertain what were the qualifications of the elector, and if it be true that chap. 7 be a part of the enacting clause, then why is not the constitution and all other laws which have a bearing upon the question? To hold that the prosecutor was in this case bound to aver that Pierce did not take the oath prescribed by section 36, would be to impose on him the intolerable burden of denying in advance all the defenses which the accused might by law set up or urge. It was properly omitted in the indictment.

The objection of duplicity is untenable. The rule is well settled that, where a statute makes either of two or more distinct acts, connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the

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same time, be coupled in one count, as constituting altogether but one offense. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction. Among the numerous authorities on this subject, we refer to the following: *R. vs. Bowen*, 1 Denison's C. C., 21; *State vs. Fletcher*, 18 Mo., 425; *State vs. Morton*, 27 Vt., 310; *Mackey vs. State*, 3 Ohio St., 363; *Stoughton vs. State*, 2 id., 562; *Commonwealth vs. Twitchell*, 4 Cush., 74; *Hinkle vs. Com.*, 4 Dana, 518; and *State vs. Price*, 6 Halst., 203. There can be no doubt that the receiving and sanctioning the reception of a vote, under the circumstances stated in the statute, are distinct offenses, and when committed separately may be indicted as such, but the indictment is not double or uncertain because both are joined in the same count for the reasons above stated. According to the authority of Mr. Chitty, it may indeed be doubtful whether the objection of duplicity can be urged in any case of misdemeanor. At page 54 of the 1st volume of his treatise on criminal law, he says: "In the case of *misdemeanors*, the joinder of several offenses will not, in general, vitiate in any stage of the prosecution. For, in offenses inferior to felony, the practice of quashing the indictment, or calling on the prosecutor to elect on which charge he will proceed, does not prevail. But on the contrary, it is the constant practice to receive evidence of several libels and assaults upon the same indictment. It was indeed formerly held that assaults on more than one individual could not be joined in the same proceeding, but this is now exploded."

It is very possible, as was contended by the counsel for the state, that the language of the record does not express the views of the learned judge who presided at the trial in the circuit, nor accurately convey the ideas which he intended to give to the jury, but that is a matter which we cannot notice. We must be governed by the record as we find it, and by the charge as we understand and as we suppose the jury must have understood it. According to the record, we

are informed that the jury were told that if the plaintiffs in error knew the facts which were relied upon as constituting, and which the judge held did constitute, such a wager as disqualified Pierce, then they were guilty of the offense described in the statute, and that it made no difference whether their receiving, or sanctioning the reception of, his vote under such circumstances, was or was not the result of an honest but misguided judgment on their part, of the law arising from those facts, and that an honest ignorance of the law would not excuse them when thus acting. These instructions are so obviously incorrect, and the opposite proposition so strongly fortified by the principles of natural reason and justice, that it needed not the vast array of authorities cited by counsel to establish it. Whether there was a wager, was a question of law and fact combined, in passing upon which the plaintiffs in error were acting in an official and *quasi* judicial capacity, and were bound to determine the law as well as the facts. They were obliged by law to act and to decide upon the qualifications of every person offering, as a duly qualified elector, to vote at the polls at which they presided. When those qualifications were, by some proper method, called in question, and when so acting, the most that reason or justice could require of them was a *bona fide* effort to discharge their duties according to the best of their knowledge and ability; and if, in so doing, they committed an obvious but sincere mistake of the law or error of judgment, they are not criminally responsible therefor. The law only required of them true candor and sincerity, and it will only punish them for corruption and falsehood—for acting contrary to their own sense of duty and the dictates of their own consciences. In this sense we understand the word “knowingly” to be used in the statute: that is, knowing that their duty and the obligation of their oaths commanded them to act otherwise. It is the wicked intent or corrupt motive which the laws punish as a crime, and it cannot be supposed that it was the intention of the legislature, in this instance, to substitute for them the upright but misdirected efforts of the mind or judgment of one whose action was not voluntary but in obedience to the requirements of the law. The max-

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im that ignorance of the law will not excuse, could only be applied to this case so far as to prevent the plaintiffs in error from setting up their ignorance of the penalties inflicted by it as an excuse for their willful violation of the duties which it imposed upon them. This they clearly could not do. Upon this last point the judgment of the circuit court is reversed, and a *venire de novo* awarded.

RAHN, administrator, vs. GUNNISON.

Whether the law requires a summons, under the present practice, to be tested, *quære*.

A summons in an action in a county court was tested in the name of the judge of the circuit court for that county: *Held*, that the matter of the attestation did not involve "the merits of the action or any part thereof," or "affect a substantial right," and that an appeal does not lie from an order denying a motion to strike out the summons and complaint for irregularity and inconsistency, and to set aside a judgment regularly rendered in such action, for want of an answer.

Where a motion to open a judgment and allow the defendant to answer, was denied, but no appeal was taken from the order denying the motion, the order is not before this court for review.

APPEAL from the County Court for *Milwaukee* County.

The nature of this case appears sufficiently from the opinion of the court.

Small & Cogswell, for appellant, contended that an appeal lay from the order of the court denying the motion to vacate the judgment for irregularity in the summons (E. D. Smith, 349), and that the summons was irregular. 1 Code Rep., 118; 2 id., 75; 4 How. Pr. R., 154; 5 id., 233, 241.

Von Deutsch & Winkler, *contra*, contended that the order did not involve the merits of the action or any part thereof, and cited 10 How. Pr. R., 89, and 4 id., 329.

October 15. By the Court, PAINE, J. This action was commenced in the Milwaukee county court. This appeared on the face of the summons served, but it was irregularly attested in the

name of the judge of the *circuit* court. Before the time for answering expired, the counsel for the defendant served notice of a motion to strike out the summons and complaint for this irregularity. But he obtained no order staying proceedings, and when the time for answering expired, judgment was regularly entered for want of an answer. The motion to strike out the summons and complaint for irregularity was afterwards brought to a hearing, the defendant claiming that the judgment should be set aside for that purpose, and it was denied. From the order denying it, this appeal is taken.

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The counsel for the respondent claims that the appeal should be dismissed for the reason that the order is not appealable. And we are of that opinion. It seems impossible to say that the mere matter of having a summons properly attested involves the "merits of the action or any part thereof," or "affects a substantial right." We have great doubt whether the law requires a summons under the present practice to be tested. There is no such requirement in chap. 124, R. S., which relates especially to that subject. If necessary at all, it results from chap. 136, which provides that all writs and process issuing from courts of record in this state shall be tested and sealed, &c. But it is very questionable whether a summons under the present practice is a writ or process within the meaning of this chapter or of the constitutional provision as to the style of writs. It is more in the nature of a notice from the plaintiff to the defendant, than of a mandate issuing from the state through its judicial tribunals. Before the Code was adopted, suits were authorized to be commenced by filing a declaration, entering a rule to plead and serving notice thereof on the defendant. R. S., 1849, chap. 90, sec. 8. So the action of ejectment was required to be commenced in that way. R. S., 1849, chap. 106, secs. 5 and 12. Those notices were not writs or process, within the meaning of the constitution, yet they were substantially like the summons of the Code. If this view is correct that a *teste* was not required by law, then this order certainly was not appealable. 10 How. Pr., 89. But even if the statute directs the summons to be tested, my own opinion still is

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that the order would not involve the merits, or affect a substantial right, within the intention of those provisions relating to appeals. I have always been of the opinion that those provisions were intended to have a more restricted meaning than has been given them by some cases in New York. They have held that all orders were appealable, except those relating to matters of practice which were entirely under the control of the court below and not regulated by positive statute. 4 How. Pr., 332. The opinion there delivered admits that there is a difficulty in arriving at the exact meaning of the language of the statute, and suggests several somewhat refined constructions, which are rejected, and the one just suggested is adopted as being a "rational, exact and well defined construction." But I confess it seems to me that the obvious intention of the statute was to confine the right of appeal from orders, to those which are not only not addressed to the mere favor or discretion of the court below, but which also have some effect upon those rights which are litigated in the suit, and that it was not intended to give an appeal from every order relating only to the form or ceremony of the proceeding, even though in respect to matters regulated by statute, where the order could have no possible effect upon the rights litigated in the suit. I know of no better illustration of my position than the one presented by this case, assuming that the law required a summons to be tested. If the law directed it, of course it would not have been left to the control of the court, and the order refusing to set aside the summons would, according to these New York cases, be appealable. But is it not obvious to every mind that the order in such case would have had no more effect upon the rights of either party connected with the subject matter of the suit, than it would if the statute had not required the summons to be tested? It seems to me so. Suppose the statute had said that the summons should be written in a beautiful handwriting, and the defendant had moved to strike it out because not so written. Would it not seem trifling to say that an order refusing, "involved the merits of the action?" Yet it would, within the rule established by these cases.

Suppose in such case, after the order refusing to strike out the summons, the defendant should not appeal but should plead to the merits, and the suit should be tried and judgment recovered against him. Could the order be reviewed here, as an intermediate order "involving the merits and necessarily affecting the judgment," under the provision authorizing such orders to be reviewed? Or would it be an error "affecting a substantial right" within the meaning of sec. 40, chap. 125, which provides that the court shall, "in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect?" I think not, but on the contrary, that the phrases "involving the merits" and "affecting a substantial right," relate only to the subject matter of the litigation, and not to mere matters of practice which cannot affect that, whether regulated by statute or not. I think the word "merits" has a settled legal meaning, excluding the latitude given to it in those cases. "Pleading to the merits," is a phrase of long standing, and distinguishes those pleas which answer the cause of action, and on which a trial may be had, from those which are of a different character. 1 Chit. Pl., 510. "Merits" is thus defined in Burrill's Law Dic.: "Matter of substance in law, as distinguished from matter of form." Matter of mere form, where it is prescribed by statute, becomes, under the New York cases, matter of substance, and a motion to strike out a summons for want of a teste, should be regarded as a plea to the merits. I think the statute used those words in a more restricted meaning, and that the order in question was not appealable.

The case shows a subsequent application, upon affidavit disclosing the defense and excusing the default, to open the judgment and allow the defendant to answer. But he did not appear at the hearing, nor was any appeal taken from the order denying the motion. That order therefore is not before us.

The appeal taken is dismissed, with costs.

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To sustain an indictment against a person charged as an accessory before the fact to the commission of a felony, it is necessary for the state to establish the guilt of the principal felon, as well as that the defendant was an accessory; and confessions of the principal that he committed the crime, are not admissible as evidence of his guilt, upon the trial of the accessory, such confessions being, as to the latter, only hearsay.

ERROR to the Circuit Court for *Portage* County.

The case is stated in the opinion of the court.

Sessions & Reed and *Geo. B. Smith*, for plaintiff in error.

J. H. Howe, Attorney General, for the state.

October 15. *By the Court*, DIXON, C. J. The only point raised by the exceptions appears to the court clearly in favor of the prisoner. He was indicted under the provisions of sec. 2 of chap. 172 of the Revised Statutes, as for a substantive felony, being charged as an accessory before the fact to the crime of arson, said to have been committed by burning the barn of one John Bourcies in the county of Portage. This and the succeeding section are borrowed from section 9, chap. 64, of the English Statutes, 7 Geo. IV. It enacts that every person who shall counsel, hire, or otherwise procure, any offense to be committed, which shall be a felony, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case, may be punished in the same manner as if convicted of being an accessory before the fact. Sidney Wright, who, it is alleged in the indictment, was the principal felon, had made his escape, and it does not appear that any indictment was ever preferred against him.

The felony is charged to have been committed by Wright on the 31st day of August, 1859. The only evidence offered on the trial, of the guilt of Wright, was his admissions made to Darius Dodd and Stiles Wheeler, two of the witnesses produced and sworn on the part of the state. Dodd testified that

he resided in the county of Portage, and knew Wright; that after the fire, and in the month of March, 1860, he had a conversation with him in relation to it, at the city of Dubuque, in the state of Iowa, and that Wright said he burned the barn by lighting matches and putting them in the straw in the night time. Wheeler testified that he saw Wright the next morning after the barn was burned, when he said, "he had better get out of this, that he had burned the barn." This was all the testimony offered concerning Wright's guilt or connection with the affair. To its reception proper objections and exceptions were taken by the prisoner.

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It is very evident that upon this testimony the conviction cannot be sustained. In order to establish the guilt of *Ogden*, it was first incumbent on the prosecutor to prove the guilt of Wright as alleged in the indictment. This done, he must then prove that *Ogden* previously procured, hired, advised or commanded Wright to commit the felony. Both these facts must be established by competent evidence. Now, however the confessions of Wright, as to the first, might have been used against him, had he been indicted and put upon his trial, it is very evident that as against *Ogden* they were wholly inadmissible. As to him they were mere hearsay, and open to all the objections which exist to that kind of testimony. For however clearly it may have appeared that *Ogden* counseled and advised Wright to commit the offense, yet if Wright never did so in point of fact, and the barn was set on fire by some one else, or by other means, then *Ogden* was innocent of the crime with the commission of which he stood charged.

If such admissions were to be received, Wright, after the advice was given, but without having acted upon it, and being innocent, and believing that his personal safety would not thereby be endangered, might make them, from feelings of ill-will and hatred to *Ogden*, for the sole purpose of deceiving and misleading others, and betraying him into the conviction of an offense of which he knew him to be innocent. They were made privately, and without the sanction of an oath; the jury had not the advantage of observing his deportment, or the manner in which his statements

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were made; no opportunity was afforded to ascertain whether he was friendly or hostile to the accused; he was subjected to no cross-examination, and his motives, means of knowledge and situation, could not be inquired into and exposed. For authorities on this question see 1 Russ. on Crimes, 8th American edition, page 43, and notes, and cases there cited.

The judgment of the circuit court is reversed, and a *venire de novo* awarded.

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This Court cannot take notice of proceedings had upon the trial of a criminal action, although the minutes of them, as taken by the clerk or judge, are returned by the clerk as a part of the record. They must be embraced in a bill of exceptions in order to become a part of the record or be entitled to notice.

A statement in the record in these words, "Prisoner in court, and sentenced by the court as follows: That the said F— P— be sentenced to state's prison" &c., purports to be merely a recital or memorandum by the clerk, and cannot be regarded as the record of a judgment of a court.

If a sentence of imprisonment in the state prison omits to direct that the convict be punished by confinement at hard labor, it is erroneous.

In such a case this court remits the record to the court below, with a direction that it proceed to give judgment upon the conviction according to law,

ERROR to the Circuit Court for *Manitowoc* County.

Indictment against *Peglow* and one *Franz*, for murder. Plea, not guilty. They had separate trials, and the former was found guilty of murder. There was no bill of exceptions signed or filed. The record entry as to the judgment or sentence pronounced, appears in the opinion of the court.

E. Fox Cook, for plaintiff in error.

J. H. Howe, Attorney General, for the state.

October 15.

By the Court, DIXON, C. J. The facts disclosed by the record in this case, bring it directly within the principles recognized and established by this court in the case of *Benedict vs. The State*, decided at the present term. No bill of exceptions was made, signed, or filed, and consequently we

can take no notice of any of the proceedings which were had after the arraignment and plea, and before verdict, although the minutes of them taken by the clerk or the presiding judge have been returned as a part of the record. There exists no valid objection either to the form or substance of the indictment, plea and verdict, and the sufficiency of the judgment or sentence which was supposed to have been pronounced, alone remains for our consideration. This is open to the same criticism as that in Benedict's case. In form it more nearly resembles that in which judgments are usually awarded, than the one which was given in his case, but nevertheless it is in this respect defective. It does not purport to be the act and adjudication of the court, but the memorandum or recital of the clerk of what had taken place. It should appear to be the order and judgment of the court itself, and not the sketch or narrative of the clerk. After the title of the action and the day of the month, it is as follows: "Prisoner in court, and sentenced by the court as follows, to-wit: that the said *Ferdinand Peglow* be sentenced to state's prison, at Waupun, for the term of his natural life, and that ten days of each year be passed in solitary imprisonment." Here the court does not consider, order and adjudge, that the defendant, the said *Ferdinand Peglow*, be punished by confinement at hard labor in the state prison, for the term of his natural life, and that he be solitarily imprisoned for the period of ten days in each and every year of his said confinement, but the clerk merely says that the prisoner was "sentenced" so and so. "It is the saying of the clerk, and not the consideration of the court." See *Wheeler vs. Scott*, 3 Wis., 362.

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The supposed sentence is likewise fatally deficient in not directing the convict to be confined *at hard labor*. This essential part of every sentence, where the punishment of imprisonment in the state prison is awarded, is altogether omitted. See section 5, chap. 150, Revised Statutes, 1849, same as section 5, chap. 181, Revised Statutes, 1858.

The judgment which the law authorizes and requires, has never been pronounced, and the case stands as if no attempt to do so had ever been made.

The circuit court is, therefore, directed to proceed to give

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judgment in this case, in accordance with the requirements of the law. Let the record be remitted to the court below, with directions to that effect.

The plaintiff in error, being illegally confined in the state prison, should be delivered into the custody of the sheriff of the proper county, who will retain him until the proper sentence be awarded.

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FRANZ VS. THE STATE.

This court cannot take notice of proceedings had upon the trial of a criminal action, although the minutes of them, as taken by the clerk or judge, are returned by the clerk as part of the record. They must be embraced in a bill of exceptions in order to become a part of the record, or be entitled to notice. A sentence in these words, "The court sentences the prisoner as follows: that the said F— F— be punished by confinement in the state prison," &c., though lacking in formality, purports to be the judgment of the court, and is sufficient.

ERROR to the Circuit Court for *Manitowoc* County.

Franz, indicted jointly with *Peglow*, for murder, as stated in the preceding case, was convicted of manslaughter in the first degree. There was no bill of exceptions made. The only question in this court was as to the validity of the judgment or sentence, which was in these words—"The court sentences the prisoner as follows: That the said *Frederick Franz* be punished by confinement at hard labor, in the state prison, at *Waupun*, for the term of ten years, and that ten days of each year, during said term, be passed in solitary imprisonment."

E. Fox Cook, for plaintiff in error.

J. H. Howe, Attorney General, for the state.

October 15.

By the Court, DIXON, C. J. With the exception of the form of the sentence which was awarded, the position of this case is precisely the same as that of *Peglow vs. The State*. At the April term, 1857, of the circuit court for the county of *Manitowoc*, the plaintiff in error and *Peglow* were jointly indicted for the murder of one *John W. Shultz*, alleged to have been committed by them in that county, on the 12th day of

December, 1856. At the October term, 1857, they received separate trials. Peglow was found guilty as charged in the indictment. The plaintiff was convicted of manslaughter in the first degree, and sentenced by the court to ten years imprisonment in the state prison. There is no bill of exceptions in the case, and we are of opinion that the record shows no error. The only one urged goes merely to the form of the sentence. By a further return, which was made pursuant to an order of the court, it appears that all the substantial requirements of the statute were complied with; and although the judgment is not recorded with as much precision and formality as it might have been, it nevertheless is sufficiently certain, and does not appear as the recital or history of the clerk, but as the act and consideration of the court, by which it was adjudged, "that the said *Frederick Franz* be punished by confinement at hard labor, in the state prison at Waupun, for the term of ten years, and that ten days of each year, during said term, be passed in solitary imprisonment."

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The judgment is therefore affirmed.

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The statute which provides that where a mortal wound shall be given in one county, by means whereof death shall ensue in another, the offense may be prosecuted in either county, is not in conflict with that provision of the constitution which secures to a person accused, the right to a trial by a jury of the county or district wherein the offense was committed.

Where a mortal blow is struck in one county, and death ensues therefrom in another, that court, in either county, which first takes cognizance of the offense, has exclusive jurisdiction thereof, and no other court can acquire any jurisdiction of it, except by a change of venue, as provided by statute.

•REPORTED from the circuit court for *Grant* county, for the opinion of this court upon questions of law arising therein.

J. T. Mills, for the state.

J. H. Knowlton, for the defendant.

By the Court, PAINE, J. The defendant was indicted in October 15.

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Grant county for manslaughter, in killing Moses Clark. The indictment alleged that the mortal wound was given by shooting in Clark county, on the 25th day of February, 1856, and that Clark died of the wound in Grant county, on the 30th day of June following. The circuit court has certified to us several questions of law which arose upon the trial.

The first is, in substance, whether, upon the facts stated in the indictment, the defendant could be lawfully indicted and tried in Grant county. There can be no doubt, and it was conceded on the argument, that the provisions of the statute, now found as sections 7 and 4, chap. 172, R. S., 1858, and which were then in force, were sufficient to authorize such indictment and trial, if those provisions are themselves valid. But the objection is based upon a clause of the constitution, to which, it is said, they are repugnant. That clause is in art. 1, sec. 7, and provides that the accused shall be entitled, "in prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district *wherein the offense shall have been committed*: which county or district shall have been previously ascertained by law." It was claimed for the defendant that the offense was committed in the county where the mortal blow was given, and that therefore this provision of the constitution secures to him a right to be tried by a jury of that county, and makes it incompetent for the legislature to authorize him to be tried elsewhere.

I am unable to assent to this proposition, for two reasons, which, taken together, are to my mind entirely satisfactory. The first is, that the premises from which it is sought to be derived, are incorrect in point of fact. That is to say, the offense, if committed at all, was not committed in Clark county. And by that I mean it was not entirely committed there. The offense of manslaughter did not consist of the mere shooting and wounding of the deceased. On the contrary, the causing of his death was the most material element of the offense, and this did not take place there. The blow was struck in one county, and its effect was produced in another. Therefore the offense, which consists both of the giving of the mortal blow, and the production of its effect, cannot,

strictly speaking, be said to have been committed in either county. The offense was committed partly in each—wholly in neither. And in whichever it is tried, a most essential element of it must be shown to have occurred in the other. The reasoning of Chief Justice PARKER to this effect, in the case of the *Commonwealth vs. Parker*, 2 Pick., 258, seems to me unanswerable. If, then, this constitutional provision is held to prohibit the defendant from being tried in any county except the one where the offense was committed, it follows, as a logical consequence, that he could not be tried at all. And this was the better opinion at the common law, when they first undertook to apply its general rule, that every offense was indictable in the county where it was committed, to a case of this kind. Hawkins' Pleas of the Crown, vol 2, p. 301. The writer there says: "and therefore at the common law, if a man had died in one county of a stroke received in another, it seems to have been the more general opinion that regularly the homicide was indictable in neither of them, because the offense was not completed in either, and no grand jury could inquire of what happened out of their own county." It is true some held that the party might be indicted in the county where the blow was struck, if the body was taken back there, but the more general opinion seems to have been as just stated, and that I regard as the logical result of the argument.

But something must be done. The general rule of the law that every offense was indictable only in the county where committed, was inapplicable to such a case. But it would not do to let the murderer escape entirely, merely because a general rule, not adapted to such a special case, could not be applied to it. It must be provided that the party could be tried in one county or the other. And in determining which, there was room for an argument in favor of either. The counsel for the defendant made an argument here of much force in favor of giving the preference to the county where the blow was struck. But the utmost effect to which I think it could be entitled, would be to show that in settling this question originally between the two counties, neither being within the general rule, the preference ought

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to have been given to that one in which the active agency of the defendant was used. But the legislators at an early day thought differently. And in providing against this difficulty they enacted, as far back as the time of Edward VI., that in such cases the party might be indicted and tried in the county where the death happened, and so the law remained in England until after the revolution, and has since been changed only so as to provide for an indictment and trial in either county. And this fact constitutes the second reason which, in connection with the first, satisfies me that the provision of the constitution cannot be construed as having the effect contended for. For it is obvious that this clause of the constitution was not inserted with particular reference to a case of this kind. On the contrary it was intended merely as the enactment of the general rule of the common law, that every offense shall be triable only in the county where committed. For the great majority of cases, the rule in that language is expressed with sufficient accuracy, because they are committed entirely in one county. But when an attempt is made to apply it to a case of this peculiar kind, where the blow is struck in one county and the death happens in another, it is found inapplicable. It leaves it uncertain in which county the accused may be tried, or rather, if strictly applied, it leaves it certain that he can be tried in neither. It must be determined then, in view of this result, what was the intention of this clause of the constitution with respect to cases of this kind. It cannot for a moment be supposed that its intention was to restore the doubts which existed at the common law as to which was the proper county for trial, or whether there could be any trial at all. Was it then not only to provide against all such doubts, but to reverse the rule as it had been so long settled, and provide expressly that the trial should be in the county where the blow was struck? It seems to me impossible that any such intention can be assumed for it. The language used is utterly irreconcilable with such a theory. For it is expressed in substantially the same manner in which the general rule of the common law was stated, upon which all the doubt and uncertainty had arisen. Those who framed the instrument were

undoubtedly familiar with the difficulty that had attended this question at the common law. They knew that it had all arisen from the fact that the offense was not committed entirely in any county. They knew in what manner it had been remedied. Now assuming that they knew all this, and that in the clause relied on they had a distinct intention of re-opening this question, reversing the decision which had been so long made, and settling the matter definitely in favor of the other county, would it not be imputing to them the most unpardonable stupidity to say that they attempted to do this by simply re-asserting the general rule of the common law that the offense should be tried in the county where it was committed? It would have been just as wise as it would for the parliament in the time of Edward VI., for the purpose of removing the difficulties on this subject, to have enacted that in all such cases thereafter occurring, the offense should be tried in the county where it was committed. People would have laughed at the absurdity of such a statute for such a purpose.

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What then was the intention of this clause? It seems to me it must have been one of two things. The rule was either stated in this general form, upon the assumption that when it came to be applied to an exceptional case, where the offense was committed partly in two counties, it would be competent for the legislative power to provide that it might be prosecuted in one or in either of them, as being the only possible application which the rule could have: or, if it intended to fix imperatively one of the counties in such a case, as the place of trial, the language employed can only be accounted for on the theory that it was assumed by the framers that for the purposes of punishment it had long been settled that the county where the death happened was to be deemed the one where the offense was committed. I am not prepared to say that it is not capable of the former construction. But if it is to be assumed that the clause fixes imperatively upon one or the other of the counties, then I think it must be held to be the one where the death happens. I am aware that a contrary decision was made in *Riley vs. The State*, 9 Humph., 646. But I am utterly unable to do what

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the court did in that case, discover an intention to change the law upon this subject as it had been settled for several hundred years, by merely re-enacting the general rule of the common law. On the contrary if that was the intention, I am entirely unable to account for the fact that intelligent men, in view of the history of the question, should have employed the language they did. If it is so clear, as the court there assume, that the offense is committed in the county where the blow is struck, it seems strange that so serious a doubt should have arisen at the common law, and still stranger that the parliament of England, in removing that doubt, should have fixed on the county where the death happened, as the proper place for trial.

On the whole, I am forced to the conclusion that there is nothing in the constitutional provision which invalidates the statute on this subject, and that the defendant was properly indicted and tried in Grant county.

The second question was, whether it was the duty of the circuit court of Grant county to transmit the case for trial to Clark county, on the application of the defendant, and whether, if it had done so, the circuit court of the latter would have had jurisdiction of it.

The application of the defendant on which this question was predicated, was not made under the general statute allowing a change of venue for cause, but it was claimed under the same constitutional provision already considered, that he had an absolute right to be tried in Clark county. It seems therefore but a different presentation of the same question. For, assuming that the statute authorizing an indictment and trial in either county is valid, it then becomes a case where the two courts had concurrent jurisdiction, and the one first attaching became exclusive. No other court could acquire any jurisdiction of that case, except by a change of venue according to law, and that extends only to a change to some adjoining county. If the argument of the defendant upon the constitutional provision was correct, then he was improperly indicted in Grant county, and the court, instead of sending it to Clark county, should have dismissed it for want of jurisdiction. If incorrect, then the ground of

his application, of course, fails. It was therefore not the duty of the circuit court to have granted that application.

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The third question is, "whether the indictment was sufficient in law to warrant a conviction and judgment thereon."

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No other question was made on the argument here, as to its sufficiency, except those already discussed. We suppose therefore this general question was intended to have reference to those points, as it should hardly be assumed that we are to examine the indictment critically to see if there are any possible objections not presented or relied on.

Understanding this as based upon the others, we therefore answer the first and third questions certified to us in the affirmative, and the second in the negative. Let this be certified accordingly to the circuit court, and an order entered that the defendant appear at the next term of the circuit court of Grant county to receive his sentence.

DIXON, C. J., dissented.

WILCOX VS. HATHAWAY.

A party bringing a civil action to this court, must furnish for the judges a *printed* case, consisting of a brief abstract of the return of the clerk, and containing all the evidence, pleadings and exhibits bearing upon the questions of law and fact to be reviewed. When such printed case is not furnished, the court will dismiss the writ of error or appeal, in their discretion, as indicated by rule 22 of this court.

APPEAL from the Circuit Court for *Sauk* County.

A motion was made by the respondent to dismiss the appeal, for the want of a printed case, as required by the rule of this court.

By the Court, COLE, J. The motion to dismiss this appeal for the want of a proper printed case, must be sustained. The appeal is from an order confirming a sale of mortgaged premises, and we have looked into the record far enough to see that it contains a number of affidavits, letters and documents which we suppose were used in the court below on

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the hearing of this matter, none of which have been printed. The rule which requires a printed abstract of the return of the clerk, is for the convenience of the members of this court, and where testimony, consisting of affidavits, letters, &c., is to be reviewed, such testimony must be printed, or we cannot undertake to examine it. It would be impossible for this court to transact the business which comes before it, if we had to examine voluminous records, decipher manuscript, and determine the force and effect of evidence in that manner. If parties desire us to pass upon the merits of such cases, they must furnish for the use and convenience of the members of this court, proper printed cases, consisting of a brief abstract of the return of the clerk, and also containing all the evidence, pleadings and exhibits bearing upon the questions of law and fact they wish reviewed. Otherwise, we shall not undertake to examine them, but will dismiss the writ of error or appeal, in our discretion, as indicated by rule 22 of this court.

Motion to dismiss appeal granted.

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BORNGESSER VS. HARRISON.

Where an action has been brought for part of the items of a running account, omitting other items of the *same* account which were due at the time, and judgment has been recovered therefor, such judgment is a bar to another action afterwards brought to recover for the items so omitted.

Where the court instructed the jury, that the judgment in such former action for part of an account was a bar to a subsequent action for the residue, and that "the whole account being between the same parties and for furnishing the same articles, all being due at the time the first suit was brought, a recovery for a part is a bar to a recovery for the other part:" *Held*, that the instruction fairly implies that the jury must find that the account sued for in the second action was part of the same account which was the subject of the first action, before they could find that it was barred by the judgment; and that if the plaintiff desired to present to the jury more definitely the question, whether there were *two* accounts between the parties, he should have asked a specific instruction upon that point.

There may be two or more running accounts in favor of one party against another, which might be the subject of separate suits, but the balance due to a party on account ordinarily constitutes but one demand, where there is nothing in the course or nature of the dealings, or in the mode in which the accounts are kept, to indicate a different intention of the parties.

APPEAL from the Circuit Court for *Milwaukee* County. June Term,
1860.

Bornmesser sued *Harrison* in March, 1860, before a justice of the peace in the city of Milwaukee, upon an account for \$47 36. The answer was a general denial, a set-off amounting to \$100, and the following: "The defendant, for a further answer, says, that on the 23d day of February, 1859, the plaintiff recovered a judgment against him for \$100 damages, besides costs, in a suit then pending before one Bode, a justice of the peace of the county of Milwaukee, in which said *Bornmesser* was the plaintiff, and said *Harrison* defendant; that the cause of action upon which said suit was brought, was an account which said plaintiff had against said defendant, for goods sold and delivered; that the cause of action, if any, for which this suit is brought, is a portion of the same account for goods sold and delivered by said plaintiff to this defendant, which cause of action, if any, accrued before the bringing of said suit, wherein said judgment for one hundred dollars was rendered, and is a portion of the same cause of action for which said first suit was brought."

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The justice rendered judgment for the plaintiff for \$47 36 and costs, from which the defendant appealed to the county court of Milwaukee county. On the trial in that court, the plaintiff produced his account book containing the original entries, in which were several charges for meat, under date of 4th and 6th of April, 1858, amounting to \$47 36, and testified that said meat was delivered by him to the captain of the vessel "Lansing," by direction of the defendant, and upon his promise to pay for it, and that the charges therefor were made at the times the meat was delivered. He also testified that there were other charges upon his book against the defendant, for meat, which commenced in 1857, and were for meat furnished to the defendant's house. The account on the book, and from which the above items were read, was for meat, with some items for the board of certain men, charged to the defendant. It occupied pages 15, 16 and 17 of the book, and commenced Feb. 20, 1858, with a charge to balance of old account, and continued to November, 1858. Each page contained two columns of charges, and each column was footed up and the amount carried to the head of

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the next column. In the fourth column, on page 16, immediately after a charge under date of Sept. 12, and on the next line, are the words, "For Ship Lansing," and then follow five items of meat, under date of April 4th, and seven under date of April 6th, together amounting to \$47 36, which are the items claimed in this action; then follow three items on the next three lines of the same column, under date of 14th, 15th and 16th of September, respectively, which complete the column, and the whole column, including the amount of the three preceding, is then footed up at \$105 84, which is carried forward to the top of the next page (p. 17), and the account there continued against the defendant. On page 16, in said fourth column, immediately above the words, "For Ship Lansing," and to the left of the column of figures, are interlined the character and figures, \$58, which is the amount of said column above that point, and immediately preceding the last three items in said column, are interlined, in like manner, the character and figures, \$47 36. There is another series of almost daily charges for April, 1858, on page 15.

The plaintiff here rested, and the defendant read in evidence the record of a judgment for one hundred dollars and costs, recovered by the plaintiff against the defendant before one Bode, a justice of the peace, on the 23d of February, 1859, in an action commenced on the 16th of the same month, upon a complaint for meat sold and delivered, &c., which was admitted by the plaintiff to comprise all the items charged to defendant on the plaintiff's book, except the items so charged on the 4th and 6th of April, 1858. The defendant also read in evidence two bills rendered to him by the plaintiff, in April, 1858, one of items of meat, commencing in 1857, and continuing until February, 1858, the other headed "Vessel Lansing, Dr.," and corresponding with the account first proved by the plaintiff.

The plaintiff, being recalled, testified: "I spoke to the defendant last winter about the account of the vessel, and he said he would pay it as soon as he had money. That was after the judgment before Bode was paid." The defendant was then recalled and testified: "I do not remem-

ber that I said anything to plaintiff about the account of the schooner Lansing. I never said I would pay it after the judgment before Bode."

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The court instructed the jury as follows: "If you find that the plaintiff had a book account against the defendant, of charges in part for meat furnished at his request at his house, and in part for meat furnished at his request for his vessel, if he brought suit and recovered for a part, leaving out a part, no matter which, the whole being due at the time, the judgment in the action would be a bar to a subsequent action to recover the rest." To this instruction the plaintiff excepted. The jury then retired, and having returned without having agreed upon a verdict, the court gave them this further instruction: "The whole account being between the same parties, and for furnishing the same article, meat, and all being due at the time of bringing the suit before Bode, the recovery of a part is a bar to a recovery for the other part, notwithstanding one portion was delivered at the defendant's house and the other portion at his vessel," to which instruction the plaintiff excepted.

Verdict for the defendant, and judgment for costs.

Von Deutsch & Winkler, for appellant, contended that the claim here sued upon, and that on which the previous judgment was recovered, were separate contracts, one, made in 1857, that the plaintiff should furnish meat to the defendant's house, and the other, made in April, 1858, that he should furnish meat to a certain vessel, and that the defendant would pay for it. *Secor vs. Sturgis*, 16 N. Y., 548, 558. In Mass., each item of a running account is considered a separate contract. 15 Pick., 409. The accounts were kept separately on the plaintiff's book, though the items of the first were at length extended to and beyond those of the second. 2. The acceptance by the defendant without objection, in April, 1858, of a separate bill of the items furnished "for the ship Lansing," rendered it equivalent to an account stated between the parties for those items, and severed it from the rest of the items charged against him. *Lockwood vs. Thorne*, 1 Kern., 170. 3. If the justice of one part of the account has been acknowledged after judgment for the other part, a separate ac-

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tion may be maintained to recover the portion so acknowledged. *Johnson vs. Pirtle*, 1 Swan (Tenn.), 262. As to whether there was a subsequent promise in this case to pay the items not included in the judgment, there was a conflict of testimony, and the question should have been submitted to the jury.

Cary & Pratt, for respondent, contended that each of the instructions given by the court to the jury was merely an enunciation of the established principle, that if several suits be brought for different parts of an entire claim, a judgment upon the merits in either will be available as a bar in the other suits (*Farrington vs. Payne*, 15 John., 432; *Guernsey vs. Carver*, 8 Wend., 492; *Bendernagle vs. Cocks*, 19 id., 207; *Fish vs. Folley*, 6 Hill, 54; *Secor vs. Sturgis*, 16 N. Y., 548); and that a running book account for goods sold, all being due, is an entire claim, and comes within that principle. *Guernsey vs. Carver*, *supra*; *Bonsey vs. Wordsworth*, 36 L. & E., 283.

October 15.

By the Court, PAINE, J. This was an action on an account for meat delivered on the defendant's vessel. The defense was, that an action had previously been brought by the plaintiff against the defendant upon the same account of which these items formed a part, and a judgment recovered, which, it was claimed, barred this suit, though these items were not claimed in the other suit. The court below charged the jury that if they found such to have been the fact, this suit was barred. We think the instruction was correct. The law was so held in *Guernsey vs. Carver*, 8 Wend., 492, and we think has not been departed from by the courts of New York since. The opposite doctrine was held in Massachusetts, in *Badger vs. Titcomb*, 15 Pick., 415, where it is said that there is no principle of law, nor any other decided case, by which the decision in *Guernsey vs. Carver* could be sustained. But the question is again reviewed by Justice COWEN, in *Bendernagle vs. Cocks*, 19 Wend., 207; who showed that the decision was sustained both by principle and authority. We do not deem it necessary to attempt to add anything to what is said in these cases. But it may be remarked that if

we understand properly the nature of an account, there is something even in the opinion in the case in Massachusetts which would sustain that decision. The court say that a "running account" will not constitute an entire demand, "unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred." Now, although that court evidently did not so regard it, it seems to us that the very fact that there is a "running account" shows the very "course of dealing" from which the "understanding" alluded to ought to be inferred. The very fact that there is such an account imports that the parties have not been accustomed to treat every separate matter of charge as a distinct debt, but on the contrary to enter it in the account to become a part thereof and going to make up the debt, which consists of the entire balance due. And such, we think, is the general understanding of men with respect to accounts. For this reason we think the case of *Guernsey vs. Carver* is correct upon principle.

But it was claimed by the counsel for the appellant that the case of *Secor vs. Sturgis*, 16 New York Rep., has overruled this doctrine and established the opposite. But we do not think it should have that effect. In that case the same firm carried on two distinct branches of business, keeping different clerks and separate account books. An account accrued against the defendant in each branch, and it was held that the two did not constitute an entire demand, so that a recovery upon one would bar the other. This was undoubtedly correct. There was nothing in such a course of dealing, or in such a mode of keeping the accounts, which would indicate any understanding of the parties that the two accounts should constitute one debt. On the contrary, every thing indicated the opposite intention. And they were, to all intents and purposes, two accounts, and were so spoken of and treated in that case, and we can see no impossibility in there being two accounts in favor of one party against another. Suppose a lawyer is also the owner of a store. He performs legal services for a client, charging them in an account. The same client has an account at the store, which is kept sepa-

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rate. The two might be joined in one suit, and so might be within the policy of the law to prevent a multiplicity of suits. But nobody would say they were one account, or that such a mode of doing business indicated any intention or understanding that they were to be blended into one claim. The question in that case was entirely different, therefore, from the one whether each of those accounts could have been divided into as many suits as there were separate and distinct items, and there was nothing in it which called for the comments which the judge delivering the opinion made upon some of the cases already referred to. The rule as stated by him is, that different actions may be brought on the different items of an account which did not arise out of a single transaction, and are not connected together by a contract, and by this he evidently meant some contract further than that to be implied from the very nature of the account itself. Now, if that is so, I have no doubt there are many accounts that might be split up into hundreds of different suits, and thus the rule be made the cause of intolerable oppression. Take the case of a man having a large number of workmen, with an account at a store, but without any special contract beyond that. He draws perhaps several hundred orders in favor of his workmen, which are all charged up in one account. These are separate transactions. Every order, taken alone, would be evidence of a distinct debt. There is no contract that the account shall all be considered one debt. The merchant might therefore bring as many hundred suits as he held orders. And yet everybody knows that the very fact that the parties make these the subject matter of a single account, implies a different understanding. While I think this case was correctly decided, upon its facts, I must therefore be permitted still to think that the previous cases were also correctly decided. And notwithstanding all he says upon the subject, I think the judge in that case admits, after all, the whole foundation upon which the former cases rest. On page 558, he says: "And usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the par-

ties." It was suggested here that there were in fact two accounts, and there was some evidence tending to show that the plaintiff intended at first to keep this claim distinct from his general account against the defendant. We think he might have kept it out of that account if he had seen fit. There were reasons, perhaps, why he should. It constituted a claim against the vessel, for which he would have had a lien. For this reason it might very properly have been kept separate from an account composed of items for which he would have had no lien. But he suffered the time within which he might have pursued his lien to expire. And there was evidence tending to show that he afterwards blended this claim in his general account against the defendant, making one account of it. We think the instruction given by the court below fairly implies that the jury must find that this was part of the same account on which the prior suit was brought, before it would be barred. If the plaintiff claimed that there were in fact two accounts, and that this never was treated as a part of the other, the judge might have submitted that question more specifically to the jury if he had been asked to do so. But he was not. On the contrary, the point in contest on the trial seems to have been, whether, if this claim was a part of the same account on which the other suit was brought, an action could still be sustained for this by reason of its being a distinct matter from the other items. Upon that point we think the judge charged correctly, and that if the plaintiff desired to have the point more definitely submitted, as to whether this was a part of the same account, he should have asked an instruction to that effect.

The judgment is affirmed, with costs.

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STATE ex rel.
SPAULDING
v.
ELWOOD.

STATE ex rel. SPAULDING vs. ELWOOD.

An act of the legislature authorized the voters of a county to decide by ballot whether a part of its territory should be annexed to an adjoining county. On the hearing of an alternative mandamus, sued out to compel the register

12	551
76	551
12	551
92	507
19	551
103	525

12	551
115	420

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of such adjoining county to record a deed for land situate in the territory whose annexation was the subject of such vote, it was *held*, that the register, in deciding whether his duty required him to record the deed, might rely upon the official canvass of the votes given at such election; but that such official canvass was not *conclusive*, and the relator might impeach its correctness.

The act referred to, provided that at said election the electors might express their choice by voting "*For detaching R—*," or "*Against detaching R—*," on separate ballots, to be deposited in a box used for such ballots only: *Held*, that a return to such writ of mandamus, stating that at said election a majority of the legal votes cast upon said question, was "*Against detaching R—*," and specifying the whole number of votes cast, and the number which were cast "*For detaching R—*," and the number which were cast "*Against detaching R—*," was sufficiently certain and specific to inform the relator of the respondent's ground of defense.

Held, also, that separate poll lists should have been kept, of all persons voting upon that question at said election, but *held, further*, that the votes of certain towns, in which no such separate poll list was kept, should not, for that reason, be rejected, but that the real will of the electors, as expressed by their ballots, should be carried into effect, notwithstanding such informality or neglect of duty on the part of the officers conducting said election.

Held, further, that the expressions in said act as to the form of the ballots, were not imperative, and that certain ballots which were cast at said election for "*R— attached*," for "*R— detached*," "*For division*," and "*Against division*," and which were counted by the canvassers, as they supposed them to have been intended, should not be rejected because not in the form prescribed by the act, but that when the intention of a voter can be clearly ascertained from the ballot itself, with the aid of extraneous facts of a public character connected with the election, such intention should have effect, and the vote be counted accordingly.

APPLICATION for a Mandamus.

An alternative writ of mandamus was issued in this case, requiring the defendant, who was the register of deeds of Green Lake county, to record a certain deed for land alleged to be situate in that county, which had been offered to him for registration, or show cause, &c. The question in controversy was, whether the territory of the town and city of Ripon, in which said land was situate, had been detached from the county of Fond du Lac, and annexed to the county of Green Lake, under an act of the legislature which declared said territory to be so detached and annexed, but which submitted the act to a vote of the people of Fond du Lac county, at an election at which the qualified electors were authorized to vote "for detaching Ripon," or "against detaching Ripon," on separate ballots, and which provided that if a majority of all the votes cast at such election should

be "for detaching Ripon," then the act should be in force, &c., from and after December 1st, 1859. This act required that the votes cast at such election should be canvassed in the same manner as the votes for state senator are canvassed in Fond du Lac county. The writ alleged that said election was duly held, and that by the return made to the clerk of the board of supervisors in Fond du Lac county, by the canvassers of the votes in the different wards and towns, it appeared that the whole number of votes given upon the question, was 4,910, of which 2,525 were "for detaching Ripon," and 2,385 "against detaching Ripon," showing a majority of 140 votes in favor of detaching Ripon from Fond du Lac county and annexing it to Green Lake county, in pursuance of said act; and that it appeared from the same return, that there were cast 107 votes "for Ripon attached," 49 "for Ripon detached," 28 "for division," and 211 "against division;" and that there was included in the votes "for detaching Ripon," and "against detaching Ripon," the votes in the towns of Forest and Friendship, the north ward of Waupun and the fourth ward of Fond du Lac, which purport to have given a majority in the aggregate, of 347 votes "against detaching Ripon," but in which no poll list of the vote was returned, as required by said act; and that by reason of the premises the city and town of Ripon became, from and after the 1st of December, 1859, a part of Green Lake county.

A motion to quash the writ was sustained, on the ground that it did not show, with sufficient clearness and certainty, that a majority of the votes at said election were cast in favor of detaching said territory from the county of Fond du Lac. The opinion of the court upon this motion appears in the report of the case in 11 Wis., 17. The writ was afterwards amended by adding an allegation, "that under and by virtue of the act aforesaid, an election was held in the county of Fond du Lac, at the time in said act provided, at which election a majority of all the legal votes cast by the qualified electors of said county of Fond du Lac, upon the said question, in pursuance of the act aforesaid, was 'for detaching Ripon' from the county of Fond du Lac."

To the writ, as amended, the defendant put in a return,

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stating that the board of canvassers of the county of Fond du Lac, at said election, duly canvassed the votes of the several towns and wards of said county, in the same manner as the votes given for state senator are canvassed in said county, from which canvass, duly recorded, &c., it appeared that at the election mentioned in said writ, the whole number of votes cast in said county, on that subject, was 5,315, of which there were given 'for detaching Ripon,' 2,604 votes, and 'against detaching Ripon,' 2,711 votes; that 107 votes, alleged in said writ to have been cast at said election, 'for Ripon attached,' were, in fact and in truth, cast against detaching Ripon; and further, that at the election held pursuant to said act, a majority of the legal votes cast on that subject were cast against detaching Ripon, the whole number of votes cast upon that question being 5,315, of which 2,711 were 'against detaching Ripon,' and 2,604 'for detaching Ripon.'

To this return the relator demurred, for reasons which are stated sufficiently in the opinion of the court.

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By the Court, COLE, J. To the answer or return made to the alternative writ in this case, the relator has taken several objections by his demurrer. But without attempting to notice all these objections in detail, we will state that we consider them untenable. In the first place, it is insisted that the return is insufficient in substance, and shows no legal excuse or justification, for the respondent's refusal to record the deed mentioned in the writ. The return sets up and relies upon the official canvass, made by the proper canvassing board, from which it appears that a majority of the votes cast upon the subject of detaching the territory of the town and city of Ripon from the county of Fond du Lac, and annexing the same to the county of Green Lake, was against such a division of the former county. The register of deeds, in discharging his duty of recording all conveyances of lands situate in Green Lake county, had an undoubted right to rely upon the correctness of the official canvass, or rather to assume that it was *prima facie* accurate, when determining the question whether it was proper for him to record the deed or

not. For if the canvass was correct, and showed the true state of the vote upon the question of division, then it was clear that the deed ought not to be recorded in Green Lake county, for the reason that it embraced land still within the limits of Fond du Lac county. It was, undoubtedly, competent for the relator to impeach the correctness of the official canvass, and his counsel attempted to do so, on the argument of the demurrer, in one or two particulars which will be subsequently noticed. But the respondent does not rest his case upon the official canvass, but states in the return, other facts which afford an ample excuse or justification for his refusal to record the relator's deed. He alleges in substance, that at the election in the alternative writ mentioned, a majority of the legal votes cast in the county of Fond du Lac, upon the subject of the division of that county, was against detaching Ripon; stating that the whole number of votes cast upon that question, was five thousand three hundred and fifteen, of which two thousand six hundred and four votes were cast "for detaching Ripon," and two thousand seven hundred and eleven votes were cast "against detaching Ripon." This general manner of pleading the facts in regard to the result of the election, is probably as specific and certain as the case admits of, or at all events it is sufficient to apprise the relator of the grounds of the respondent's defense, and that he does not rely upon the official canvass alone, but upon the real will of the electors as expressed through the ballot box upon the question submitted to them. Now if this allegation of the return is true—and the demurrer, of course, admits the truth of all matters well pleaded—then it is at once apparent that the respondent very properly refused to record the deed. In that case the proper place for recording the deed would be Fond du Lac county. So that the material fact in the writ, and the one upon which the entire right of the relator to have his deed recorded in Green Lake county depends, namely, that at the election held pursuant to the act of the legislature, a majority of the legal votes cast by the electors of Fond du Lac county was in favor of detaching the territory of the town and city of Ripon from that county, and annexing the same to the coun-

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ty of Green Lake, is fully traversed and put in issue by the return. And upon this ground, therefore, it is very clear that the return is not defective in substance. But it is alleged in the relation and writ, that there was included and counted by the county board of canvassers, in the vote "for detaching Ripon," and "against detaching Ripon," what was returned, purporting to be votes cast at such election, in the towns of Forrest and Friendship, and the north ward of the village of Waupun, and the fourth ward of the city of Fond du Lac, which said towns and wards purport to have given a majority in the aggregate, "against detaching Ripon," of three hundred and forty-five votes, when the canvassers in those towns and wards made no return of a separate poll list of the votes cast upon the subject, provided for in the act of the legislature, nor any designation whatever of the persons who voted upon said question, and it is averred that no such poll list was kept, nor any other means used upon said election to determine who voted, or how many votes were cast upon that question, prior to the opening of the ballot box containing said votes, and therefore it is insisted that the votes of those towns and wards should have been rejected and thrown out by the county board of canvassers for this informality in the return, or irregularity in conducting the election. As the act of the legislature provided that any qualified elector of Fond du Lac might vote at the election therein named, "for detaching Ripon," or "against detaching Ripon," on a separate ballot, written or printed, to be deposited in a box used only for such ballots, it is quite clear to our minds that separate poll lists should have been kept of all persons voting upon that question. But assuming that no such separate poll lists were kept in the above named town and wards, what is the consequence? Is the vote of those towns and wards to be rejected for that reason? Cannot this mistake be rectified in this proceeding, and is it not the duty of the court to do so, and give effect to the will of the electors? By the constitution, no county with an area of nine hundred square miles or less, can be divided or have any part stricken therefrom, without submitting the question to a vote of the people of such coun-

ty; nor unless a majority of all the legal voters of the county voting upon the question shall vote for the same (art. 13, sec. 7). When a contest arises as to whether a majority of the legal votes are in favor of a division or not, and when the officers appointed by law to canvass the votes given upon that subject, have failed to perform their duty, how can effect be given to this constitutional provision except by the court's rectifying such mistakes as are set up in this relation and writ?

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The act of 1859 provided that the election should be held and the votes canvassed in the same manner as the votes for state senator of Fond du Lac county were canvassed. Suppose the question had arisen before the canvassing board of the county, as to who was entitled to the certificate of election for the office of state senator of that county, what then would have been the duty of the canvassers? Sec. 107, chap. 7, R. S., 1858, provides that whenever it shall satisfactorily appear that any person has received a plurality of the legal votes cast at any election for any office, the canvassers shall give to such person a certificate of election, notwithstanding the provisions of law may not have been fully complied with in noticing or conducting the election, or canvassing or returning the votes, so that the real will of the plurality may not be defeated by any informality. It appears to us that this proceeding to determine the question as to whether a county has been divided or not, is strictly analagous to a proceeding, in the nature of a *quo warranto*, to determine the right of a person to hold and exercise an office, and that substantially the same rules of law are applicable to it. Now it is the well settled doctrine of this court, that in a contest between individuals as to the right to an office, it will go back and rectify any omission or mistake of the canvassing boards, and give effect to the real will of the electors, as expressed through their ballots. *Carpenter vs. Ely*, 4 Wis., 420; *Bashford vs. Barstow*, id., 567, and cases there cited. We therefore do not think the votes in the towns and wards heretofore alluded to, should be rejected and thrown out for the reason that no separate poll-lists were kept of the names of the persons who voted upon the question of division.

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It further appears from the relation and writ, that certain votes were cast "for Ripon attached," "for Ripon detached," "for division," and "against division," and that these ballots were counted by the canvassing boards as they supposed they were intended by the electors to be cast upon that question. Now it is contended that these ballots should not be counted at all, because they are not in the precise form prescribed in the act of the legislature. The law provided that any qualified elector, &c., might vote "for detaching Ripon" or "against detaching Ripon," on a separate ballot, and it is insisted that no ballots should be counted except those which contained one or the other of these expressions. The doctrine is not controverted, that the intention of the elector is generally to control in determining for what person or what proposition a ballot should be counted, and that where this intention is not manifest from a bare inspection of the ballot itself facts and circumstances of a public character connected with the election are sometimes resorted to for the purpose of ascertaining the intention of the elector; in other words, that the ballot, like a contract, may be read in the light of surrounding circumstances, in order more perfectly to understand the intention and meaning of the voter. But it is insisted that this familiar doctrine can have no application to this case, for the reason that the legislature has prescribed the form of the ballot, or the exact words in which an elector should express his will, upon the question of the division of Fond du Lac county. It is true the legislature, having regard to the nature of the proposition to be submitted to the people, for the convenience of the electors, and to secure certainty in the expression of their will upon the proposition, prescribed a form for the ballot, but we do not think they thereby intended to exclude all other ballots not in this precise form. There is nothing imperative in the language of the statute that the elector should express his will in certain words and no other. Suppose an elector had written upon his ballot, "I am opposed to having township number sixteen north, of range number fourteen east, embracing the territory of the town and city of Ripon, detached and set off from the county of Fond du Lac, and to its being attached and

annexed to the county of Green Lake;" will any one seriously contend that such ballot should not be counted against division? And is there any good reason for saying that the legislature intended that a ballot in this form should be rejected and thrown out by the canvassing board? If we hold that the legislature intended that an elector should only express his will upon the subject of division in the exact words given in the law, then a ballot in the form supposed should be rejected. But we cannot think that such was the intention of the legislature. And when the intention of the elector can be clearly ascertained from the ballot itself, or with the aid of competent evidence *dehors* the ballot, such intention should have effect, and the vote should be counted. So, as a matter of law, we cannot say that no votes can be counted except those in the form prescribed by the act.

It follows from these views that the demurrer must be overruled.

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OWEN VS. THE STATE

The circuit court of a county has jurisdiction of a prosecution for bastardy, which was commenced before a justice of the peace of the same county, and in which the defendant was recognized to appear in such circuit court, although the complainant was, at the time of the birth of the bastard child, and of the commencement of the prosecution, a resident of another county in this state.

ERROR to the Circuit Court for *Milwaukee* County.

This was a prosecution for bastardy, commenced before a police justice of the city of Milwaukee, on the complaint of one Jane McAfferty. The defendant entered into a recognizance for his appearance before the circuit court of Milwaukee county, upon trial in which he was found guilty. There was evidence tending to show that the complainant had never been a resident of the county of Milwaukee, but was, at and before the birth of the bastard child, and ever since had been, a resident of the county of Jefferson in this state; and the defendant's counsel, at the proper time, moved the court to dismiss

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the case for want of jurisdiction, which motion was overruled, and the defendant excepted. On the trial the defendant asked the court to instruct the jury as follows: "That this proceeding is for the benefit of the complaining witness, and if the jury find that she was a resident of Jefferson county before the birth of the child, and has resided in that county since the birth of the child, and still resides there, then this action cannot be maintained here, and they must find for the defendant." This instruction the court refused, and the defendant excepted. A motion for a new trial, on the ground that the court erred in refusing to dismiss the case, and in refusing to give said instruction, was overruled, the defendant excepting.

October 15.

By the Court, COLE, J. This cause was submitted upon the record, without argument and without any briefs, and we are therefore ignorant of the points upon which the plaintiff in error relies to reverse the order of filiation made by the circuit court. The record shows that several objections were taken on the trial to the admission and exclusion of certain testimony, but we do not perceive any error in the rulings of the circuit court upon those points. It appears likewise that the counsel for the plaintiff in error relied upon the objection that the circuit court of Milwaukee county had no jurisdiction of this proceeding. We are unable to understand why that court had not jurisdiction. The complaint was made before a justice of the peace of Milwaukee county, by the mother of the bastard child. A warrant was issued, upon which *Owen* was arrested, and recognized to appear at the next term of the circuit court of Milwaukee county, to answer the complaint preferred against him. Upon the trial in that court, the jury found him guilty. Whereupon the circuit court made an order of filiation, adjudging him to be the father of the bastard child, and charging him with its maintenance and support, and ordering him to pay the complainant a hundred dollars, for the support of the child from its birth to that time, and five dollars upon the 20th day of each month thereafter. And he was required to give a bond to the supervisors of the proper town, in conformity to section 7, chap.

37, of the bastardy act. All this proceeding appears to be regular and proper, and we think there is no doubt that the circuit court of Milwaukee county had jurisdiction of the cause.

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The order of filiation is affirmed, with costs.

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A prosecution for bastardy is a *quasi* criminal proceeding, and cannot be brought to this court by appeal, but by writ of error only.

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APPEAL from the Circuit Court for Dodge County.

The case is stated in the opinion of the court.

Billinghurst & Lewis, for appellant.

J. H. Howe, Attorney General, for the state, contended that the provisions for appeals, (chap. 139, R. S.), apply only to civil actions, and that this is a *quasi* criminal action, in which a summary method of arrest and punishment is authorized, and in which the proceedings are not for the benefit of any private individual, but are designed to protect the people against loss for the maintenance of the bastard, the supervisors of the town being authorized to make the complaint. R. S., chap. 37, § 11.

By the Court, PAINE, J. This was a complaint against the defendant for the purpose of compelling him to provide for the support of a bastard child. There was a trial in the circuit court, and he was convicted and adjudged to be the father of the child, and to provide for its support. From the judgment he has appealed to this court, in the manner provided for appeals in civil actions. The attorney general moved to dismiss the appeal, on the ground that the statute relating to appeals applies to civil actions, and that a complaint charging the party with being the father of a bastard child, is not a civil action within the meaning of that statute. We are inclined to be of this opinion. The statute which allows

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an appeal to be substituted for a writ of error, was evidently designed only for civil actions, and not to change the practice in criminal cases.

Bastardy proceedings, it is true, are not strictly of a criminal character, yet they have always been considered as *quasi* criminal cases, and the practice in them has been like the practice in criminal cases. We think the new system was not intended to change the proceedings in such cases, and that if the defendant desired to review the judgment of the circuit court, he should have sued out a writ of error.

The motion to dismiss the appeal must be granted, with costs.

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STATE ex rel. CHRISTOPHER VS. THE CITY OF PORTAGE.

Where the charter of a city provided that upon the application of two-thirds of the owners of lots on a street, or part of a street, the council should have power to cause such street, or part of a street, to be graded, &c., and for the purpose of defraying the cost, to levy and collect a special tax on the lots abutting on such street, or part of a street, in proportion to the *front* or *side* of such lots respectively, it was *held*, that so much of an ordinance requiring such an improvement to be made, as directed that each lot, or part of a lot, should be charged with the cost of the work done in *front thereof*, to be collected as a special tax, was repugnant to the charter and void.

Held, also, that it was not necessary for the city council to have provided in one ordinance for the doing of the work, and for the manner of its payment, and although that part of the ordinance above referred to as being repugnant to the charter, is void, the other portion of it, which directed that the work should be done, and the contracts for doing it should be let, &c., may be sustained, and that the council are bound to provide for the assessment and equalization of a tax for the whole work done, among the several lots liable therefor, as the charter contemplates, if, under the circumstances, the provisions of the charter in that respect can still be substantially executed.

Under the power to order the improvement of a street, or *part* of a street, the city council might order the making of a side-walk on one *side* of a street only.

APPLICATION for a mandamus to compel the mayor, &c., of the city of Portage to provide for the assessment, equalization and collection of a special tax to defray the expense of

certain work alleged to have been done by the relator under an ordinance of said city, or to show cause, &c. The affidavit of the relator showed that on the 1st of April, 1857, two-thirds of the owners of lots upon a certain portion of one of the streets of the city of Portage, made application in due form to the mayor and council of that city, for the passage of an ordinance requiring side-walks and street crossings to be made on one side of such portion of said street, and that an ordinance was passed on the 8th of April, 1857, requiring the owners of such lots to make such side-walks and crossings by the 1st of July following, in pursuance of the ordinance in relation to the improvement of streets, passed by said mayor, &c., on the 31st of March, 1857, and providing that in default thereof, the street commissioner of the proper ward should cause it to be done at the expense of the owners of said lots, as provided in the last mentioned ordinance. The ordinance of March 31st, 1857, provided that whenever the mayor, &c., should order a side-walk to be made, the owner of each lot bordering on the proposed improvement, should, at his own expense, and within the time limited by such order, do the work required thereby, upon so much of the street as lies in front of his lot, and that the owner of a corner lot should continue the work to the center of the intersecting street, and that if such work were not done within the time so limited, it should be forthwith done under direction of the street commissioner of the proper ward, at the expense of the owner of such lot; that the cost thereof should be levied and collected as a specific tax thereon, in the same way as the annual tax; that in such case the street commissioner, after giving a certain notice, should let the work to be done by contract, &c., and upon its completion give the contractor a certificate as to each lot, stating the amount chargeable to each lot and due to the contractor thereon, which certificate might be filed with the city clerk at any time before the tax list should be made out, and the amount should be by him added to the other taxes as a special tax upon such lot, and be inserted in the tax list and warrant for the current year, and be collected as other taxes, and paid to the owner of such certificate. The affidavit also

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alleged, that the owners of lots "4, 5, &c." of block 254 (on the part of the street above referred to), made default in doing the work as required by said ordinance of April 8th; that the street commissioner of the proper ward thereupon let the work, in pursuance of said ordinance of March 31st, to one C., who assigned the contract to the relator, who performed said work, and received the certificate of said commissioner, showing that the amount of said work was \$1,115 44, and was due to said relator, and chargeable on said lots "4, 5, &c.," in said block 254; that he filed said certificate with the city clerk, on the 19th of August, 1857, and requested said mayor and council to provide for the assessment, &c., of a special tax, for the purpose of defraying the cost of said work, in accordance with said ordinance and the charter of said city, which they refused to do, &c.

The charter of the city of Portage provided, that upon application in writing of two-thirds of the owners of lots upon any street, or part of a street, the city council should have power to cause such street, or part of a street, or the sidewalk thereon, to be graded, paved or planked, "and to levy and collect a special tax on the lots and lands bounding and abutting on such street or side-walk, in proportion to the *fronts* or *size* of such lots respectively, for the purpose of defraying the cost of the same," and that it should be the duty of the city council to provide, by ordinance, for "assessing, collection and equalization of such special tax."

An alternative mandamus having been issued in this case, a motion was made to quash the writ, upon grounds which are sufficiently indicated in the opinion of the court.

John Delany and *Samuel Crawford*, for relator, cited 10 Wend., 363, and 23 id., 458.

H. W. Tenney and *Alva Stewart*, for respondent.

October 15.

By the Court, PAINE, J. This was an application for a mandamus to compel the mayor and council of the city of Portage to provide for the assessment, collection and equalization of a special tax upon certain lots. A motion to quash the alternative writ was filed, and the principal objection made upon the argument was, that the ordinance providing

for doing the work and letting the contract under which the relator claims, was repugnant to the charter, and therefore void.

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That all that part of the ordinance which provided that each lot, or part of lot, should be chargeable with all the work done in front of it, and that owners of corner lots should continue the work to the centers of the intersecting streets, is repugnant to the provisions of the charter on that subject, can admit of no question. The charter evidently requires that when any street, or part of street, is ordered to be graded, and side-walks made, the section so ordered to be improved, shall, for the purposes of taxation, be treated as a whole, and that when the whole amount of tax to be raised for that work is ascertained, it shall be equalized and divided among the various lots chargeable therefor, according to their front or size. This, it is obvious, is an entirely different principle of assessment from that which charges each lot with the entire expense of the improvement in front of it, and serves to avoid much of the inequality and injustice of the latter system. But it is the latter which is provided for in the ordinance under which the relator's contract was let, and that part of it is, of course, void.

But it was strenuously contended by his counsel, that although this part of the ordinance was void, yet that inasmuch as the council had power to direct the work to be done, and to let the contracts therefor, the ordinance should be considered so far valid, and a mode of payment should be now provided for by the council in pursuance of the provisions of the charter. We have come to the conclusion that this position may be sustained, and that if it is still possible for the council to provide by ordinance for such an assessment and equalization of the tax for the whole work, as the charter contemplates, among the various lots liable therefor, then the ordinance already passed may be held valid, so far as directing the work to be done and the contract to be let is concerned. Whether such an equalization can now be provided for, we confess, seemed to us somewhat doubtful, inasmuch as the ordinance provided that such of the lot owners as chose might do the work in front of their own lots.

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If a part availed themselves of this privilege and the others not, the adjustment and equalization of the tax would be rendered more difficult and complicated. But we are inclined to think that a system might still be adopted through which the object would be attained.

It was not necessary for the council to provide in one ordinance for the doing of the work, and also for the manner of payment. If they have attempted it, and the latter provision is void, that need not invalidate the whole, if they have proceeded in such a manner that the provisions of the charter can still be substantially executed.

We are also of opinion that under the power to order the improvement of a street, "or part of a street," the council might order the improvement of one side. That is certainly a part of a street, and the only limitation on their power of subdivision would seem to be the provision requiring the application of two-thirds of the owners of lots on the street, or part of street, to be improved.

It was objected that the commissioner's certificate was void for uncertainty, inasmuch as it states that the work is "chargeable on lots 4, 5, &c., in block 254." It was said that it did not appear to what the "&c." referred, and that the owners of lots 4 and 5 would not know what portion of the tax they were to pay. But if we have taken a correct view of the effect of the charter, this is entirely immaterial. For no part of the amount mentioned in the certificate is as yet chargeable to any particular lot, and it cannot be known what portion is so chargeable until the council have provided for the equalization of the tax, as required by the charter.

For these reasons we have concluded to overrule the motion to quash, with leave to answer if it is desired.

STATE ex rel. GATES vs. FETTER.

An act of the legislature authorized the electors of a certain county to vote, at the annual election on the first Tuesday in April, upon the question of the re-

removal of the county-seat of said county, and provided that the votes cast upon that question at such election should be canvassed, &c., by the same officers and at the time and in the manner provided by law for canvassing, &c., the result of elections for state or county officers, and that such result should be reduced to writing by the canvassing officers, and certified by them to be true and correct, and recorded by the clerk of the board of supervisors in a county record book in his office. *Held*, that the legislature intended that the votes cast upon said question at such election should be canvassed by the county board of canvassers, on the Tuesday following said election, when the votes for chief justice were canvassed.

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An alternative mandamus, sued out to compel the clerk of the circuit court of said county to keep his office at A—, alleged that at such election a majority of the votes cast upon the question was in favor of the removal of the county-seat to A—, but that the board of canvassers had refused to count the votes of certain precincts in said county, which had given a majority of 157 votes in favor of such removal, on account of alleged defects in the returns of the votes cast therein, and had canvassed the votes of the remaining towns or precincts, and certified that a majority of 86 votes had been cast at said election against such removal. The return to the writ admitted that the board of canvassers had refused to count the votes of certain precincts, as stated in the writ, on account of defects in the alleged returns of the votes therein, but insisted that, inasmuch as the board of canvassers had made their certificate, as required by said act, showing that a majority of the votes cast upon said question at said election was against such removal, and such certificate had been recorded by the clerk of the board of supervisors, as in said act required, the respondent could not lawfully remove his office, &c. *Held*, on demurrer, that the return was, in effect, an admission of the incorrectness of the certificate of the board of canvassers, and that a peremptory mandamus should be awarded for the removal of said office to A—.

APPLICATION for a Mandamus.

By an act of the legislature, the electors of the county of Buffalo were authorized to vote, at the annual election on the first Tuesday of April, 1860, upon the question of the removal of the county-seat of that county from Upper Fountain City to the village of Alma. The act provided that the votes cast at such election should be canvassed, certified, and the result ascertained and declared, by the same officers, and at the time and in the manner provided by law for canvassing, certifying and ascertaining the result of elections for state or county officers; and that such result, when so ascertained, should, by the canvassing officers, be reduced to writing, and by them certified to be in all respects true and correct, and that when the same was so reduced to writing and certified, the clerk of the board of supervisors of said county should record the same in some county record book in his office.

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On the 4th of May, 1860, the relator, a resident of said county, applied to this court for an alternative mandamus, commanding the respondent, who was clerk of the circuit court of said county, to keep his office at said village of Alma, alleging, in his affidavit, that said election was held pursuant to law, and that a majority of all the votes cast upon the question of removal of the county-seat of said county to Alma, was in favor of such removal, but that the board of county canvassers had rejected the returns of said election from the towns of Nelson and Naples, and the first ward of Buffalo City, in said county, which cast, in the aggregate, a majority of 157 votes in favor of such removal, on account of alleged insufficiency and defects in the form of such returns, and, having made a tabular statement of the votes cast in the remaining towns and wards of the county, had certified that said tabular statement was true and correct, as compiled from the original returns, and that from such returns it appeared that the whole number of votes polled in said county at said election, upon the question of the removal of the county-seat, was 758, of which 336 were for the removal of the county-seat to Alma, and 422 against such removal.

An alternative writ having been granted upon this application, the respondent made return thereto, stating: 1. That the returns of the votes cast at said election, upon said question of removal, were required by law to be canvassed, and the result ascertained and declared, on or after the Tuesday next following the general election for state or county officers next thereafter to be held, and by the same officers who should then canvass and declare the result of the votes given at such general election. 2. That the respondent admitted that the said board of canvassers did refuse to count and canvass the votes which the relator claimed they should have counted, and that such refusal was on the ground of the insufficiency of the alleged statements and returns of the inspectors of the election in said towns of Naples and Nelson, and said first ward of Buffalo City, but alleged that after such refusal, said board of canvassers made their certificate in writing, as required by said act, showing the result of said

election, and that a majority of the votes cast at such election was against the removal of said county seat to the village of Alma, which certificate was duly recorded by the clerk of said board, in a county record book in his office, and the respondent insisted that if said board had a right by law to canvass said returns, he was legally bound to refuse to remove his office to said village of Alma. 3. That the act under which such election was held, was unconstitutional.—To this return the relator demurred.

Tucker & Cole, for relator.

E. Fox Cook, for respondent.

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By the Court, COLE, J. The demurrer to the return must be sustained, and a peremptory writ awarded.

October 15.

There is no difficulty in arriving at the intention of the legislature in passing chap. 110, General Laws, 1860, p. 100. The act provided that the electors of Buffalo county might vote on the first Tuesday of April—the day on which the town elections were held—upon the question of the removal of the county seat of that county from Upper Fountain City to the village of Alma. And the legislature undoubtedly intended that the votes upon that question should be canvassed by the county board of canvassers on the Tuesday following the election, the day on which the votes for chief justice were canvassed. It is unreasonable to suppose that the legislature did not intend that the votes upon the subject of removal should be canvassed until after the general election next November. This construction of the law is unwarranted and not to be adopted.

In one part of his return the respondent relies upon the certified statement made by the canvassing board, under the act, and recorded, in which the canvassers certify and declare that a majority of the votes cast upon the subject of the removal of the county seat, was against such removal. This official statement might perhaps have shown a good excuse or justification for the respondent's refusing to remove his office from Upper Fountain City to the village of Alma, had he not in effect admitted the incorrectness of that statement, in consequence of the rejection by the canvassing board

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of the votes of the towns of Naples and Nelson, and of the first ward of Buffalo City, as stated in the relation. If the votes cast upon the subject of removal in those towns and that ward, were counted, then the result showed a clear majority in favor of the removal. So that the respondent, by his own answer, impeached the correctness of the official canvass, and showed that it did not state the true result of the election.

Peremptory mandamus awarded.

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A writ of error should be returned by the inferior court or the clerk thereof, with the record, and in order that it may be so returned, the *writ itself* should be left in the custody of the inferior court.

Where a writ of error was served by delivering an attested *copy* thereof to the judge and clerk of the inferior court, and showing them the original, and the judge annexed to such *copy*, and certified up under the seal of his court, a transcript of the indictment and proceedings in the cause, (the original writ being filed in this court by the attorney of the plaintiff in error, with proof of such service,) it was *held*, that the record had not been duly brought into this court, and that the writ of error should be dismissed.

ERROR to the Municipal Court for the City and County of Milwaukee.

The case is stated in the opinion of the court.

S. Park Coon, for plaintiff in error.

D. Corson, for the state.

October 15.

By the Court, COLE, J. The plaintiff in error was indicted for the crime of larceny, second offense, and tried and convicted of such offense, in the municipal court for the city and county of Milwaukee, in December last. After judgment was rendered on the conviction, a writ of error was sued out, for the purpose of removing the record in the cause to this court, for review. It appears that this writ was served by delivering an attested copy thereof to the judge

and deputy clerk of the municipal court, and showing them the original. Whereupon the judge of that court has annexed to the copy of the writ of error, and certified up under the seal of the court, a copy of the indictment, and a transcript of the proceedings in the cause. The original writ was returned and filed in this court, by the attorneys, we suppose, for the plaintiff in error, on the 9th of March last, with proof of service as above stated, and upon that day a motion was made, on behalf of the state, to dismiss the writ, for the reason that the original was not returned to this court by the judge of the municipal court, with a transcript of the record, and further, because it had never been returned to this court by any person authorized to return the same. We think this motion must be granted. Our statutes contain no specific directions in regard to the service and return of writs of error. By section 25, chap. 139, R. S., 1858, it is provided that writs of error in civil and criminal cases, may issue of course out of the supreme court of this state, in vacation as well as in term time, and shall be returnable to the same court. This statute however leaves the matter, as to the service and return of writs of error, to be governed by the general rule of practice. In this state, we believe, the practice has been, to file the original writ with the clerk of the court in which the judgment was rendered, who makes return thereto of the proper transcript and record. And when such return of the clerk, with the writ, is filed in this court, we have jurisdiction of the cause, and can proceed to judgment. As we understand it, it is the original writ which brings up the record of the inferior court. The supreme court writ runs to the inferior court, and should be returned by that court, or the clerk thereof, with the record. And in order that such court may return the writ with the proper record, it should be left in the custody and under the control of the inferior court. In this way a proper return may be made, and the cause be brought to this court. Nor do we think that the position of the cause is varied because the judge saw fit to make return to a copy of the writ. The usual practice in the circuit courts is for the clerk to make the return, and that undoubtedly should have been done in this

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case. (See chap. 199, Private Laws, 1859, establishing the municipal court, p. 386.) But passing by this irregularity, suppose an inferior court should send up a record of a cause to the supreme court without any writ whatever. No one would insist, because the papers were filed with the clerk of the supreme court, that *ipso facto* the supreme court had jurisdiction. The court of review must issue its writ, running to the inferior court, and, by means of its process, bring the cause before it in a proper manner. And the record is sent up by the inferior court in obedience to the writ and according to its mandate.

We have found no authority bearing directly upon this question of practice in respect to the service and return of writs of error, but reason and the general analogies of the law would seem to show that the correct practice is such as has heretofore obtained in this state, and which we have herein indicated and pointed out.

It follows from these views, that the record of this cause has never been brought up from the municipal court, and the motion to dismiss the writ must be granted.

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STARK and another vs. BROWN.

Upon the death of a mortgagor of real estate, the equity of redemption descends to his heirs, and is not barred by a sale of the land under a decree of foreclosure in a suit to which the administrator only of the mortgagor is made defendant. There was nothing in the statutes in force in the territory of Wisconsin, in 1842, to change this rule.

A sale under such decree will, however, operate as an *assignment* to the purchaser, of the interest of the *mortgagee* in the mortgaged premises. The application of this principle is not affected by the fact, that the purchaser at such sale was one of the administrators of the holder of the mortgage, and, as such, one of the plaintiffs in the suit for its foreclosure.

Where, after the sale to such administrator under such decree, A, in a suit for that purpose, against such administrator and the widow and heir of such holder, obtained a decree, adjudging that *he* was, at the time of such foreclosure suit and sale, the equitable owner of said mortgage, and was entitled to a conveyance from them of the mortgaged premises, and of all their interest therein, and quit-claim deeds for said premises were accordingly executed by

them to him, and he afterwards made a warranty deed for said premises to B, who made a like deed therefor to C: *Held*, in ejectment by the heirs of the mortgagor against C, that the above mentioned decree and deeds, although the latter contained no reference to the mortgage or mortgage debt, operated as a *transfer* to C of the interest which the *mortgagor* had in said premises, so that, after entry, C stood in the position of a mortgagee in possession, after default in the payment of the mortgage debt, and could not be evicted in such action.

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APPEAL from the Circuit Court for *Milwaukee* County.

Action by *David Drake* and *J. L. Stark*, for the recovery of an undivided fourth of certain land in Milwaukee county. The defendant admitted his possession of the land, and claimed title thereto. On the trial, the plaintiff proved that one Pliny Drake died intestate at Milwaukee, in April, 1838, seized in fee of the land in controversy, leaving surviving him his mother and nine brothers and sisters, his sole heirs at law. Of these heirs, *David Drake* was one, and had received from his mother and six of his brothers and sisters a quit-claim deed for their interest in said land, and had afterwards quit-claimed one-half of his entire interest therein to his co-plaintiff, *Stark*.

The defendant proved that letters of administration of the estate of Pliny Drake were granted to one Aldrich, in November, 1838; that the inventory of said estate, filed by the administrator, showed personal assets to the amount of \$94 84; that the report of the commissioners appointed to hear and adjust claims against said estate showed debts amounting to \$393 89, besides expenses of administration; that among the claims allowed by said commissioners was an account of one William N. Gardner, against the deceased, in which the aggregate amount of the items debited was \$269 38, among which items was the following: "Balance due on note for \$200, dated Oct. 14th, 1836, secured by mortgage, \$206 53;" and the amount of the credits was \$159 21, leaving a balance due to said Gardner of \$110 17. The administrator testified that he had never closed up the estate, because the land having been sold on foreclosure, there was nothing left for payment of the debts.

The defendant then read in evidence a mortgage, executed by Pliny Drake to one Isaac H. Alexander, upon an undi-

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vided fourth of the quarter-section in which the land in controversy is situate, dated October 14th, 1836, to secure the payment of \$400, according to the tenor of two notes of that date, executed by him to the said Alexander; also an endorsement upon said mortgage, dated Oct. 31st, 1836, by which it was recited that said Alexander, for value received, did thereby transfer to said William N. Gardner all his interest in said mortgage, and the notes accompanying the same, and did guarantee the payment of the money secured to be paid by said mortgage and notes, and that not more than \$61 had been paid by the mortgagor on account of the moneys secured thereby. The defendant then offered to read in evidence the record of a suit in equity in the district court for Milwaukee county, in which Lindsay Ward, Maria Gardner, and William B. Sheldon, administrators of William N. Gardner, deceased, were complainants, and said Aldrich, administrator of Pliny Drake, deceased, was the *sole* defendant, and purporting to be a suit for the foreclosure of the said mortgage executed by Pliny Drake to said Alexander; and also a deed for said mortgaged premises, made by a master in chancery of said court, to Lindsay Ward, the purchaser at the sale under the decree in said suit; offering at the same time, to show the decease of said William N. Gardner and the appointment of said complainants as his administrators. To the reading of this record and deed in evidence the counsel for the plaintiff objected; the court sustained the objection, and the defendant excepted. The defendant again offered to read the record of said foreclosure for the purpose of showing that the title of the assignee of the mortgage vested in the purchaser under the foreclosure, and to connect himself with the title of such purchaser by various *mesne* conveyances, but the court ruled that the evidence was inadmissible for that purpose, and the defendant excepted. The record thus excluded sets forth the bill of foreclosure filed by the administrators of William N. Gardner, against said Aldrich, as the administrator of said Pliny Drake; the proof of service of process; a decree for the sale of said mortgaged premises, rendered in November, 1842 (without any direction that the complainants might purchase at such

sale); the report by the master of his sale and conveyance of the mortgaged premises to Lindsay Ward for \$100, and the confirmation of said sale by the court.

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The defendants then offered proof that Lindsay Ward, Maria S. Gardner and William B. Sheldon were duly appointed administrators of William N. Gardner, deceased, before the commencement of said foreclosure suit, which was admitted by the court, (the plaintiffs objecting to it as irrelevant), and also offered in evidence the record of a suit in chancery in the Racine district court, in which one Palmer Gardner was complainant, and Lindsay Ward, Thomas Wright, Maria S. Wright and William S. Gardner were defendants, to the admission of which the plaintiffs objected, but the court overruled the objection, and the plaintiffs excepted. This record was in substance as follows: The complainant, Palmer Gardner, alleged in his bill, (which was filed in 1846,) that about the 31st of October, 1836, his brother, William N. Gardner, held as his *agent*, an agreement between him and one Isaac H. Alexander, and on his behalf and towards the payment of a balance due on said agreement, received, about that date, from said Alexander, the assignment of the mortgage hereinbefore mentioned as executed by said Pliny Drake to said Alexander, and of the debt secured thereby; that said William afterwards received from said Drake \$178 on said debt, and accounted therefor to the complainant, but died soon afterwards, leaving said Maria S. his widow, and William S. Gardner, an infant, his only child; that his administrators, finding said mortgage and notes among his papers, supposed them to be a part of his estate, and, in 1842, commenced a suit for the foreclosure of said mortgage in the district court for the county of Milwaukee, and upon a decree rendered in such suit, said mortgaged premises were sold to said Lindsay Ward, and the usual conveyance therefor made to him by the master; that said purchase was made by said Ward on behalf of the estate of said William N. Gardner; that in August, 1843, the said administrators made a settlement of said estate, with the probate court of Milwaukee county, and distribution of the personal estate was then made, and, among other things so distributed, was the land

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in controversy, one-third thereof to said Maria, and two-thirds to said William S., the same being represented by said administrators to be the proceeds of personal estate held by said Ward in trust for said heirs, to be distributed as such: that no conveyance had been made by said Ward of said land, and that said Maria and William S. had never taken possession thereof; that the complainant was entitled to the benefit of said foreclosure and sale, and to a conveyance of said land, upon payment of the amount due by him to the said estate for the services, disbursements, &c., of said decedent, which were admitted to amount to \$150 (which he averred his readiness to pay), and that said Maria was at that time the wife of one Thomas Wright; *Prayer*, that an order be made directing that said Lindsay Ward, Thomas and Maria S. Wright, and said infant, William S., by his guardian, should convey said land to the complainant, on the payment of said sum of \$150. The defendants were served with process, a guardian *ad litem* appointed for the infant, and such proceedings were thereupon had, that on the 20th of April, 1846, said court decreed that Lindsay Ward and his wife, the said Thomas and Maria S. Wright, and the said William S. Gardner, by his guardian *ad litem*, should execute quit-claim deeds of said land to said Palmer Gardner, upon his payment of said sum of \$150 to said Thomas Wright, on behalf of said Maria S. Wright, and to said infant; that said complainant was entitled to all the rights and interest of the defendants in said lands; and that the deed executed by the guardian of said infant, should be of full force when approved by said court, or a master thereof.

The defendants also read in evidence a quit-claim deed from Lindsay Ward and wife to Palmer Gardner, for the undivided fourth of the quarter section embracing the land in controversy, dated Jan. 22, 1846, and a like deed to Palmer Gardner, for the same land, from Thos. S. Wright and Maria his wife, dated April 20, 1846, and a like deed to Palmer Gardner, for the same land, from William S. Gardner, by his guardian appointed for that purpose, dated April 20, 1846, and indorsed "approved" by a master in chancery of said Racine district court, and a warranty deed for the same

land, executed by Palmer Gardner to J. F. Gruenhagen, dated December 19th, 1846, and a like deed for the same land from said Gruenhagen and wife to the defendant, dated December 7th, 1852; to the admission of each of which deeds the plaintiffs excepted.

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The circuit court instructed the jury, that "under the decree in said equity suit in Racine county, and the deeds executed by Lindsay Ward and wife, Thomas Wright and wife, and William S. Gardner, by his guardian, respectively, to Palmer Gardner, and the deeds from Palmer Gardner to Gruenhagen, and from Gruenhagen to *Brown*, the defendant *Brown* acquired all the rights of mortgagee under said mortgage from Pliny Drake to Alexander, and being in possession in the right of mortgagee, could not be ousted by an action at law in the form attempted in this case;" to which instruction the plaintiffs excepted.

Verdict and judgment for the defendant.

Palmer & Stark, for appellants:

1. The foreclosure proceedings against the administrator of Pliny Drake, and the master's deed to Ward, were a nullity. The heirs of the mortgagor were necessary parties to such a suit. Story's Eq. Pl., § 196, and cases there cited; 2 Barb. Ch. Pr., 176. By the statutes then in force in this territory real estate *descended* to them, and therefore it vested in them *immediately* upon the death of their ancestor. Greenl. Cruise, title 29, chap. 2, § 1. The administrator is not a proper party to such suits, except (in some states) to enable the complainant to obtain a judgment for payment of a deficiency out of the estate in his hands, (2 Barb. Ch. Pr., *ubi supra*; Story's Eq. Pl., 182-196; *Leonard vs. Morris*, 9 Paige, 90), and in this state no such judgment could be rendered, the statute having provided a different method for adjusting such claims. The administrator could not redeem (1 Hill. on Mort., 364; Story's Eq. Pl., 182; 2 Story's Eq. Jur., 291; 4 Kent's Comm., 162; 2 Barb. Ch. Pr., 193-4; 9 Johns., 611); nor was he, under our statutes prior to 1850, entitled to the possession, or the rents of the real estate. Judgment against him could not bind such real estate. The court therefore had no jurisdiction in these foreclosure proceedings;

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the heirs were not barred of their equity of redemption; nor could the judgment operate to assign the mortgage to Ward, or have any other effect. 2. The quit-claim deed executed by Ward and wife to Palmer Gardner, could not convey his interest, as administrator, in the debt secured by the mortgage. 3. The deeds from Wright and wife, and William S. Gardner, to Palmer Gardner, conveyed no interest. Their deeds purporting to convey the fee of the mortgaged land, without reference to the note or to their interest as mortgagees, did not transfer that interest. Such an interest, before foreclosure, or possession taken, is not realty. 1 Hill. on Mort., chap. XI. It does not descend to the heirs, but goes to the personal representatives. 1 id., p. 249. It cannot be seized on attachment or execution. 4 Conn., 235. It is a mere lien on the land, a mere incident of the debt. 4 Conn., 235; 6 id., 159; 2 Burr., 978; 1 Branch, 110; 11 John., 584; 1 Pow., 252, n; 5 N. H., 482. An assignment of the mortgage need not be in writing, (5 Rawle, 242; 3 Johns. Cases, 329; 1 John., 580; 4 id., 48; 11 id., 534); but the transfer of the debt carries with it, as an incident, all interest in the mortgage (1 Hill. on Mort., chap. 11; 4 B. Monroe, 582; 8 id., 287; 5 Cow., 202; 1 Penn., 280; 13 N. H., 249; 5 id., 420; 9 S. & M., 448; 10 id., 631, 120; 1 John., 580; 2 Burr., 978; 1 Blackf., 137; 10 Vt., 294); payment or tender of the debt, even after due, before foreclosure or entry by the mortgagee, extinguishes the lien, (26 Wend., 541; 13 John., 7; 5 Cow., 202; 2 Harris & McH., 17; 3 id., 399; 10 Ohio, 433; 6 Hill, 65; 2 Greenl. Cruise, p. 121, note); and after such payment, an assignee of the mortgage acquires no title by foreclosure and purchase at the sale. 5 Hill, 272. These doctrines are sustained by the decisions of this court. *Fisher vs. Otis*, 3 Chand., 83-85; *Martineau vs. McCollum*, 4 id., 153; *Croft vs. Bunster*, 9 Wis., 503; *Cornell vs. Hichens*, 11 Wis., 353. "A mortgage does not carry with it the debt, but the debt carries with it the mortgage." 4 Chand., *supra*. Hence an assignment of the mortgage, or a conveyance of the land, by the mortgagee, without any transfer of the debt, is a mere nullity. 1 Kent's Comm., 194, and note; 1 Hill on Mort.; *Jackson vs. Willard*, 4 John., 41; *Jackson vs. Bron-*

son, 19 id., 325; *Huntington vs. Smith*, 4 Conn., 235; *Wilson vs. Troup*, 2 Cow., 195; *Bell vs. Morse*, 6 N. H., 205; 11 id., 274; id., 298; 15 id., 145; 4 Foster, 484; 5 id., 425; 32 Me., 175; 4 Florida, 283; 9 Mis., 280; 2 Halsted's Ch. R., 219; 4 Iowa, 484; 5 Cal., 334. Some cases in Mass. hold that where a second grantee of an equity of redemption has procured a quit-claim from the mortgagee to himself, it will operate as an assignment and not as a discharge of the mortgage; but these cases depend on the principle in equity that upholds the security in such case for the protection of the releasee against the intervening title of the first grantee. *Hunt vs. Hunt*, 14 Pick., 374; 1 Hill on Mort., 496 *et seq.*; *Carll vs. Butman*, 7 Greenl., 102. Counsel also cited and distinguished *Crooker vs. Jewell*, 31 Me., 306; *Givan vs. Doe*, 7 Black., 210; and *Phillips vs. Bank of Lewistown*, 18 Penn., St., 394. 4. The intention of all parties in the suit brought by Palmer Gardner, was to perfect the absolute legal title to the land in Palmer Gardner, and not to assign the note and mortgage to him. Notwithstanding the decree in that suit, the note, if not paid, remained unsatisfied among the assets of Wm. N. Gardner's estate, and the mortgage, as a security therefor, remained undisturbed. Except as the decree authorized a conveyance for the infant, the deeds executed in pursuance of it, stand on the same footing as similar deeds from the same parties, without such decree, and are therefore of no effect. 5. Even if Palmer Gardner had become assignee of the note and mortgage, still his conveyance of the land, by warranty deed, to Gruenhagen, and that of the latter to *Brown*, neither of which referred to the note or the mortgage, could not have operated as an assignment of them. See authorities *supra*. 6. Not only were the notes not produced, but there was no evidence that either of them remained unpaid, and no trace of them since 1842. More than twenty years had elapsed from the time they fell due, before the commencement of this action. Was not the presumption conclusive from the lapse of time, that they were paid?

James S. Brown, for respondent:

1. The foreclosure is not void, and cannot be impeached collaterally. The heirs had no more interest in the real than

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in the personal estate, until the final order of the court for distribution. R. S., 1839, pp. 301, 302, 304, 307, 316. That the administrator represented the real estate was settled in *Grignon vs. Astor*, 2 How. (S. C.), 319, 338. Since the late law in England, subjecting real estate to the payment of debts, it has been held that the heirs are not necessary parties for that purpose. *Story vs. Fry*, 1 Y. & C. New R., 603; *Bridges vs. Hinxman*, 16 Simons, 71; *Telfair vs. Roe's Ex'rs*, 2 Branch, 407; *Collins vs. Griffith*, 2 Pr. Williams, 313; *Madox vs. Jackson*, 3 Atkyns, 405; Story's Eq. Pl., §§ 163 and 176. 2. But if the foreclosure failed to bar the heirs of their equity of redemption, still the defendant, as assignee of the mortgage in possession after default, cannot be disturbed by ejectment. (1.) That such assignee cannot be thus disturbed is held in *Post vs. Arnott*, 2 Denio, 344; *Merritt vs. Lambert*, 7 Paige, 346; *Parsons vs. Welles*, 17 Mass., 419; 5 Pick., 233; 16 How., 580; *Van Ness vs. Hyatt*, 13 Peters, 298; *Jackson vs. Hull*, 10 John., 480; *Astor vs. Hoyt*, 5 Wend., 617; *Phyfe vs. Riley*, 15 id., 248; and in this state, *Gillet vs. Eaton*, 6 Wis., 30; *Tallman vs. Ely*, id., 244. (2.) The purchaser, under the foreclosure sale, acquired the rights of such an assignee. *Frische vs. Kramer's lessee*, 16 Ohio, 125. The mortgagee, being a party to the record, is, as between himself and the purchaser, estopped from denying the effect of the decree and sale, and the purchaser obtains all the rights of the mortgagee by estoppel. The case of *Watson vs. Spence* is overruled in this state by *Ely vs. Tallman*, *supra*. (3.) Palmer Gardner, having been the real equitable owner of the notes and mortgage of Pliny Drake, the district court by its decree established his title to "all the rights and interest held by the defendants" in that suit. (4.) The subsequent warranty deeds from Palmer Gardner to Gruenhagen, and from the latter to *Brown*, must be held effectual to convey to the defendant the mortgage interest. The grantors having attempted to convey the absolute fee which they supposed themselves to possess, are estopped from denying that they conveyed the less interest which they really had. A deed by the person owning the mortgage, of the whole mortgaged premises, conveys the mortgage interest. *Wilson*

vs. Troup, 2 Cow., 195; *Gillet vs. Eaton*, and *Tallman vs. Ely*, *supra*. A mortgagee, after default, has a legal estate in the land, which may be conveyed by deed, subject to the debtor's right of redemption. See cases cited above, under (1.) See also *Philips vs. Bank of Lewistown*, 18 Penn. St., 394; *Givan vs. Doe*, 7 Blackf., 210; *Gould vs. Newman*, 6 Mass., 239; *Hunt vs. Hunt*, 14 Pick., 374; 21 Ala., 497; *Crooker vs. Jewell*, 31 Me., 306; 32 Me., 197; 24 Miss., 368. (5.) The assignment of a mortgage for a valuable consideration, carries with it the debt, as necessary to make such assignment effectual and valuable. In this case the deeds of the land, being virtual assignments of the mortgage, had the same effect. 3. Even if the defendant does not own the mortgage, he is in possession under the mortgagee and with his assent, and can no more be ousted by the mortgagor, by means of an action of ejectment, than could the mortgagee himself.

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By the Court, PAINE, J. This was an action of ejectment. It was conceded that the title was originally in Pliny Drake, who died in April, 1838. The plaintiffs claim, one as one of his heirs, and both under the other heirs. The defendant claims under a foreclosure proceeding upon a mortgage executed by Pliny Drake, which was instituted after his death, and to which his administrator alone was made a party.

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The defendant claims, first, that this proceeding was effectual to transfer the entire title to the purchaser at the foreclosure sale, divested of all right of the heirs; and secondly, if not, that it was at least effectual to transfer the interest represented by the mortgage, and that the subsequent deeds, through which he claims, must be held to operate as an assignment of that mortgage interest, so that he stands in the position of a mortgagee in possession after condition broken, and cannot be ousted by ejectment. If either of these propositions can be sustained, it is conceded that the plaintiffs' action must fail.

We agree with the plaintiffs, and, as it seems, with the court below, that the first is incorrect. The rights of the heirs—they not being made parties to the suit—could not

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be divested by the foreclosure proceeding. The argument of the defendant that it should have that effect, is founded upon what he claims to be an entire change in the policy of the law, from that which existed in England, under which the rule that heirs were necessary parties to a foreclosure was established. That change is in making the land subject to the debts of the deceased, through a sale by his administrator, and in giving him, as our law now does, and as he claims it then did, the possession of the real estate during the administration. But we cannot concede to these changes, the effect contended for. Nor do we think, as argued by counsel, that these statutes make the interest of the heirs in the real estate, prior to an order for its distribution, precisely the same as their interest in the personal estate, leaving the administrator to represent both for all purposes. It is well known that the legal title to the personalty is vested in the administrator. But it could hardly be claimed that these statutes vest in him the legal title to the real estate. That must still be held to descend to the heirs, and vest in them on the death of the ancestor, subject to be divested by a sale for the payment of debts. They, therefore, have an immediate interest in the premises, which cannot be divested by a foreclosure to which they are not parties.

Counsel relied upon the case of *Grignon's Lessee vs. Astor*, 2 How., 319, as establishing the proposition that "in a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, and the administrator represents the land," &c. It is true that the court in that case asserted that doctrine, and held that the provision in the statute requiring notice to be given to the parties interested, before the court should pass upon the application, did not affect its jurisdiction. Whether that is the law or not in this state with respect to sales by administrators, we shall not now attempt to decide. It is certainly not in conformity with a long list of adjudications that might be cited, among which are the following: *Bloom vs. Burdick*, 1 Hill, 130; *Sherry vs. Denn*, 8 Blackf., 542; *Givan vs. McCarrroll*, 1 S. & M., 351; *Lessees of Adams vs. Jeffries*, 12 Ohio, 253; *Messenger vs. Kintner*, 4 Bin., 97; *Schneider vs. Mc-*

Farland, 2 Coms., 459; *Bank vs. Johnson et al.*, 7 S. & M., 449.

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But we do not feel called upon to discuss the correctness of that decision, for the reason that it must be held to relate only to a proceeding by an administrator, under the statute, to sell the real estate for the payment of debts. When the court said that the administrator represented the land, they meant in that proceeding. And it would be entirely unwarrantable to say that they intended to assert that he represented it for all purposes, so that a foreclosure suit to which he alone was a party would divest the rights of the heirs. There is a great difference between the two cases. In the one, the statute expressly authorizes and requires him to proceed for the purpose of making a sale. The design is to pay the debts of the estate, which is one of his most important duties. In the other case, it is conceded that there is no statute expressly requiring or authorizing him to be made a party to a foreclosure, and his character as a representative of the land for that purpose is sought to be derived entirely from the rights which the law gives him as to the possession, and as to obtaining a license to sell on a certain contingency. Even if the case in 2 Howard should be held to establish the doctrine that, on a direct statutory proceeding by him to effect a sale for the payment of debts, he is to be considered as the representative of the land for all the parties interested, so that the judgment would not be void, though such other parties had no notice, we do not by any means think it can have that effect with respect to foreclosure suits, or any other by which the title to property is sought to be affected.

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But we think the defendant's second position is well taken. And that is, that although the foreclosure sale had no effect to divest the interests of the heirs, the purchaser must be held to have acquired the mortgage interest. The counsel for the appellants have attacked the correctness of this doctrine. But it has already been passed upon by this court in a manner with which we are entirely satisfied. The case of *Watson vs. Spence*, 20 Wend., 260, sustains the view of the plaintiffs. That of *Frische vs. Kramer's Lessee*, 16 Ohio, 125, sustains the opposite view. And in *Ely vs. Tallman*, 6 Wis., 258, this court distinctly repudiates the doctrine of the

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former case, and approves that of the latter. The plaintiffs contend that this case is distinguishable from *Ely vs. Tallman*, by the fact that there some of the parties in interest were served with process, and made parties to the suit. But that was not so in *Frische vs. Kramer's Lessee*. The mortgagor was a party there, it is true, but he was made so after he had sold the property; and he had no more interest in it than had the administrator in this case, and possibly not as much. But we do not think the decision should turn upon the point whether somebody actually interested is made a party. On the contrary, the conclusion would seem to rest rather upon certain equitable considerations between the mortgagee and the purchaser. The former had full power at any time to assign all his interest to the latter. If he sees fit to invoke the agency of the law, not only to accomplish that assignment, but to divest all adverse rights and transfer them also to the purchaser, if by any reason he fails to accomplish the latter object, should that also defeat the former? It seems to us not. Even though technically a correct argument can be made against the validity of the judgment as such, it still seems to us that the proceeding ought to be allowed to operate as a mode by which the mortgagee voluntarily transferred his interest, at least, to the purchaser. Where the mortgagee has assented to the sale in that manner, and taken the purchaser's money, this conclusion would seem to rest safely on the doctrine of equitable estoppel, whatever irregularities there might be in point of form. But here the property was bid in by one of the administrators of the assignee of the mortgage, who was one of the complainants in the suit. As such he would undoubtedly be held a trustee for the benefit of those interested in the estate, in a controversy between him and them. But there is no such controversy here, and we do not see that this fact has any material bearing upon the question.

It was subsequently discovered that the equitable title to the mortgage was in the brother of the assignee, and he, ratifying the foreclosure sale, commenced an equitable suit against the purchaser and all the other parties interested, to obtain a transfer of the interest acquired at that sale, to him-

self. Such a transfer was adjudged, and deeds executed accordingly, and through them the title comes in a regular chain to the defendant. It is now urged by the plaintiffs that, even conceding that the foreclosure sale operated as an assignment of the mortgage interest, still these deeds cannot be held to have operated in the same way. This conclusion is derived from the fact that the mortgage is a mere incident of the debt, and that a deed of the land neither purports to, nor does assign the debt, and therefore the mortgage interest in the land cannot be held to pass. There are some cases apparently sustaining this position, as *Jackson vs. Bronson*, 19 John., 325. It is a very short case, and the circumstances are not fully stated. The court said: "The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity." But the court do not discuss the question whether, under any circumstances, such an assignment could be held to transfer the debt, and thus become operative as an assignment of the entire mortgage interest. The same question is discussed in *Wilson vs. Troup*, 2 Cow., 195. The mortgagee had there sold parts of the mortgaged premises by warranty deed, and the question was, whether he afterwards had the right to foreclose. Several opinions were delivered. WOODWORTH, justice, uses general language in terms applicable to a case where the mortgagee had conveyed the whole land, and holds that such a conveyance would not operate as an assignment of the mortgage. SUTHERLAND, J., on the other hand, makes the case turn on the point that he had only sold a part of the property, and SAVAGE, C. J., concurs upon the same ground.

Other cases cited by the plaintiffs hold that a mere deed of the land by the mortgagee does not operate as an assignment of the mortgage and debt, yet clearly imply that, under certain equitable circumstances, it might have that effect. Such is the case of *Bell vs. Morse*, 6 N. H., 205, where the court say that they "have no doubt that, under certain circumstances, a conveyance of the land by the mortgagee will pass the debt secured by the mortgage." And they further imply that it would be sufficient if it appeared

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that the mortgagee, at the time, had a right to transfer the debt. The same idea is suggested in subsequent cases in that state, though not decided. *Ellison vs. Daniels*, 11 N. H., 283. In *Weeks vs. Eaton*, 15 N. H., 145, while holding that the facts of that case brought it within the rule as previously decided, the court intimate that if the amount of the claim had been liquidated, it "might have been assigned by a deed of the land, with warranty." And again in *Furbush vs. Goodwin*, 5 Fost., 450, it is said that "the doctrine of the cases is, that a mere quit-claim deed, purporting to be a conveyance of the land mortgaged, will not pass the debt," &c., implying still that a warranty deed might, under certain circumstances, have that effect.

On the other hand, in the case of *Hunt vs. Hunt*, 14 Pick., 374, there is a well reasoned opinion, deciding that a quit-claim deed by the mortgagee, of his interest in the land, would operate as an assignment of all his rights as a mortgagee. And the same doctrine is held in *Carll vs. Butman*, 7 Greenl., 102, and in *Crooker vs. Jewell*, 31 Maine, 306. It is suggested by counsel in their brief, that "these cases depend upon the principle of equity that upholds the security in such case for the protection of the releasee against the intervening title of the first grantee." This suggestion is doubtless based upon the facts in *Hunt vs. Hunt*, where the assignee of the mortgage was the second purchaser also of the equity of redemption. The court kept the mortgage interest alive after its assignment to him, so as to protect him against the prior conveyance of the equity of redemption. But the question whether that interest should be kept separate for his benefit, after he obtained it, is entirely distinct from the one whether he had obtained it. The equitable principle alluded to relates entirely to the former question, and has no bearing upon the latter. On the contrary, the conclusion upon that seems to rest upon another equitable principle, which is, to give some effect to the intention of parties in their deeds, if, consistently with the rules of law, they can have any effect.

In addition to these cases, we may say that the case of *Frische vs. Kramer's lessee* seems necessarily to show that a

deed of the land in such a case should operate as an assignment of the mortgage interest. That case gave such an effect to a deed on a foreclosure sale, though it no more purported to assign the debt or the mortgage than did the subsequent deeds in this case from the purchasers at the foreclosure sale. We have followed that case upon that point, and I am unable to see why the same reasoning should not hold good with respect to a deed directly from the mortgagee. If by procuring the officers of the law to make a deed, in a case where no jurisdiction was obtained over adverse parties, the mortgagee is held to have assigned the mortgage, by the same reasoning the purchaser, supposing himself to have acquired the entire title, should be held to have assigned it by a deed purporting to have conveyed the land. See *Ward-er vs. Tainter*, 4 Watts, 270. We think, therefore, that the court below was right in holding that the defendant had acquired the mortgage interest, and stood in the position of a mortgagee in possession after condition broken, not to be ousted by ejectment.

It is urged that the note should be accounted for or produced. But no exception seems to have been taken on that point at the trial, other than in connection with the admissibility of the deeds. The court was not asked to submit any question as to its payment to the jury. And there was no evidence tending to show payment, and we think no presumption of it arises from lapse of time, under the circumstances of this case, where all the parties have evidently acted on the supposition that the note was merged in the decree.

We think, upon the whole, there was no error, and the judgment must be affirmed, with costs.

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Sundry persons subscribed sums varying from fifty cents to ten dollars, for the purpose of assisting the members of an unincorporated musical association to erect a building for their use as a band. With these and other funds, do-

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nated to or furnished by the members, a frame building was erected by the band on ground belonging to A, (who was one of said subscribers, and also one of the band,) under a lease for two years, which stipulated that the lessees, or a majority of them, might remove it at any time during said term. About a year after the building was erected, the association disbanded, and B, (one of the twelve persons who had composed the band,) purchased the interest of nine of the other members in the building, and threatened to remove it. In an action by A and several other of said subscribers for an injunction against such removal of the building, *Held*, that such subscriptions were absolute gifts to the members of the band, and that the building so erected was a chattel owned by them, as tenants in common, which they had a right to dispose of as they thought proper.

Held, also, that if A might otherwise have had a right to interfere with the disposition of the building in opposition to the wishes of B, who owned 10-12 of it, the terms of the lease precluded him from objecting to the removal of the building from his lot.

APPEAL from the Circuit Court for *Jefferson* County.

The case is stated in the opinion of the court.

D. F. Weymouth, for appellant. [No argument on file.]

J. M. Bingham, for respondents, as to the relation in which the members of the band stood to the contributors, and as to the power of courts of equity to control the funds of voluntary associations, and to prevent a perversion of gifts to uses not intended by the donors, cited 4 John. Ch. R., 136; 1 Pars. on Con., 101, 372; Story's Eq. Jur., § 1190; Burr. Law Dic., title "Trusts;" 19 Vt., 410; 7 id., 241; 11 id., 296; 9 Wend., 401; 1 Sandf. Ch. R., 440-505; 2 id., 183; 2 Denio, 492; 6 Paige, 639; 3 Day, 450; 12 Conn., 113; 2 Hill, 543; 18 Pick., 318; 3 Barb. Ch. R., 242. The lease given by Higgins does not estop him from interposing to prevent a perversion of the trust fund.

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By the Court, COLE, J. We are of the opinion that the subscriptions mentioned in the pleadings in this case, were intended to be absolute gifts to the members of the band, to aid them in erecting a house in which they might practice music. This is the declared object of the subscriptions as stated in the subscription paper, a copy of which appears in the case. It reads as follows: "Whereas, the Palmyra Brass Band propose to build a hall or house for the purpose of meeting to practice music, and for the general accommodation of said brass band, now, therefore, the undersigned, for the purpose of as-

sisting the said band to erect said building, do hereby agree to pay to the treasurer of said band, the sums set opposite to each of our respective names, at any time when demanded, on twenty days' notice."

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It appears that the band was composed of twelve persons, who had no articles of association or copartnership, nor any legal organization, or corporate existence, but who voluntarily met together to practice instrumental music, and who were commonly known as the Palmyra Brass Band. Some fifty or sixty persons subscribed to the subscription paper, in sums varying from fifty cents to ten dollars. The appellant *Riddell*, and *Higgins*, one of the respondents, were members of the band, and each contributed to the erection of the building. The hall was built upon land leased of *Higgins*, by moneys paid upon the subscription, and other moneys donated to the band, and furnished by the members. After occupying the hall for a year or so, the band broke up and disbanded, and *Riddell* became the assignee, by purchase, of the interests in the building of nine members of the band, and, as owner of 10-12ths thereof, claims the right to control it. And one question arising in the case, is as to what were the nature and character of the subscriptions paid upon the subscription paper; were they intended to be absolute donations to the band, to enable them to build a hall in which to practice music, and which hall was to belong to the members composing the band, and to be disposed of as they might think proper, after they had ceased to use it as a place of meeting; or did the persons intend, who subscribed and paid fifty cents, one, two or three dollars, &c., to hold and retain an interest in the building to the extent of their respective subscriptions. We have adopted the former view of the case, and have no doubt but the moneys paid upon the subscription paper were intended to be, and in fact were, absolute gifts to the members of the band. It is the same, in our judgment, as though the subscriptions had been made to enable the members of the band to buy instruments of music, or uniforms, or any thing of that nature. In the latter case no one would contend that a subscriber was to have and retain an interest in the instruments or garments

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which his subscription helped to buy. In the present case the donations were for the use and benefit of the members of the band, to aid them in erecting a hall in which to practice music. And this hall, thus created, was undoubtedly a chattel, and in the absence of all proof to the contrary, we must presume that it belonged to the members of the band in equal parts. The members were tenants in common in the chattel. This action was commenced by *Higgins* and several of those who had paid upon the subscription paper, for the purpose of restraining *Riddell* from removing the hall (which was a frame building) from the site upon which it had been erected. If our conclusion in regard to the nature of the subscriptions is correct, it follows that the subscribers had no interest whatever in the building, and therefore had no right to join in bringing this action. Their gifts being absolute, they have no right to set up a claim to the building in which their subscriptions were invested. In respect to *Higgins*, although he was a tenant in common with *Riddell* in the building, owning two-twelfths thereof, yet he cannot maintain the action, for one most conclusive reason. The building was erected upon his land. He gave a written lease of the lot, signed by himself and all the other members of the band, except two, who were minors, in which he demised the lot to the members of the band for two years from the date thereof, they yielding and paying therefor one dollar rent. And it was expressly agreed and covenanted in the lease by and between the parties thereto, that a majority of the band should have the right to remove the building off from the land at any time during the continuance of the lease, or within twenty days after the expiration thereof, and the lessees covenanted, among other things, that they would remove said building, and give quiet and peaceable possession of the lot, within the time specified, unless the lease should be renewed by the lessor. Now, in the face of this stipulation in the lease, what right has *Higgins* to interpose and say the building shall not be removed? If he would otherwise have had the right to control the property, and say what disposition should be made of it, as against the wishes of *Riddell*, who owned the greater portion of the building,

he certainly ought not to be permitted to object to its removal from his lot in view of the above condition in the lease. For he had required that the building should be removed at the expiration of the lease, and had agreed that a majority of the band might remove it before that time, if they should think proper to do so. And now for him to interpose and ask that the building shall not be removed, is flying in the face of his own covenant. We think his mouth should be shut upon that point.

The order of the circuit court, which restrained and enjoined the appellant from removing the building described in the complaint, must be reversed, and the cause remanded for further proceedings according to law.

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12	591
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12	591
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The presumption of guilt arising from the unexplained possession of property recently stolen, is one of fact and not of law, nor of law and fact combined.

The force of such presumption is not affected by the fact that the line between two states intervenes between the place where property was stolen and that where it was found immediately afterwards, in the unexplained possession of the person indicted for the theft.

A conviction for larceny will not be reversed because the court instructed the jury that such presumption was one of *law*, when it does not appear that the attention of the judge was called to the form of the expression adopted by him, or that any specific instruction on that point was asked by the counsel for the prisoner.

The record in this case not purporting to contain *all* the charge given to the jury this court may presume that in omitted portions of it, the circuit judge properly explained the nature of the presumption, leaving the jury to determine its force.

It is the practice of this court not to review questions involved in instructions given to the jury at the circuit, where it appears that the attention of the circuit judge was not fairly and explicitly called to them.

ERROR to the Circuit Court for *Dane* County.

Graves, alias *Davis*, was indicted in the circuit court for Green county, for stealing a horse. Plea, not guilty. The venue was changed to the circuit court for Dane county, where the prisoner was convicted. On the trial it appeared

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that the horse alleged to have been stolen was turned into the street by the owner, one Hurlburt, in Green county, about dusk, on the 14th of July, 1859, and on the 16th of that month, was in the possession of the prisoner in Lee county, Illinois (one hundred miles distant), who there gave his name as Davis, and exchanged the horse for cattle, stating that he brought the horse from Freeport, and lived near Joliet. When arrested, on the 20th of that month, he told the officer that he got the cattle at Joliet. No further statement of the evidence seems necessary to an understanding of the principles involved in the case.

The court charged the jury as follows: 1. "Did the defendant steal, take or drive away the property of Hurlburt, in the county of Green in this state, as charged in the indictment—is the question for you to decide in this case." "To convict, you must believe that he did, beyond a reasonable doubt." 2. "The law presumes that the person found in the unexplained possession of property recently stolen, is the thief." 3. "If you find that the property, as described, and belonging to the person as charged in the indictment, was stolen within the county of Green, in this state, and the defendant was soon after found in the possession of that stolen property in the state of Illinois, and that possession is unexplained, the law will presume that he is guilty of the theft." To the last two of these instructions the defendant excepted.

The defendant asked the court to instruct the jury as follows: "The admission of the defendant, elicited by the prosecution, that he got the horse in Freeport, Illinois, coupled with the fact that he had possession of the horse, and traded him away, in Ogle or Lee county, Illinois, is insufficient to warrant the conclusion that the defendant had ever been in Green county in this state, and there committed the crime charged against him in this indictment. Nor would proof of the bare fact of possession of the horse in Ogle or Lee county, Illinois, by the defendant, two days after the property had been taken or stolen in Green county, be sufficient to authorize you in finding that the defendant committed larceny of the horse in Green county, in this state. The prosecution should have shown that the defendant had

previously resided, or been seen in this state. Proof of possession of stolen property in another state, is not proof from which it can be inferred that the person having such possession, stole him in this state. By statute, such possession in this state would be evidence of larceny committed by the possessor, in every county where such possession was." But the court refused to give said instruction, or any part thereof, and the defendant excepted to such refusal.

J. H. Knowlton and Samuel Crawford, for plaintiff in error.

J. H. Howe, Attorney General, for the state.

By the Court, DIXON, C. J. There can be little doubt that the presumption of guilt arising from the unexplained possession of property recently stolen, is a presumption of mere fact and not of law, nor of law and fact combined, and that the strictest accuracy of language would oblige us so to name it. It is purely an inference of fact to be dealt with by the jury, and not one of law to be applied by the court, and falls strictly within Mr. Starkie's definition of natural presumptions, or presumptions of *mere fact*. It depends wholly upon its own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience, and is altogether independent of all artificial legal relations. For these reasons I was at first strongly inclined to the opinion that it was error for the circuit judge to instruct the jury that the law presumed the possessor, under such circumstances, to be the thief. It seemed to me that, by so doing, he did not leave it to the jury to weigh that fact, after they had found it, as a circumstance tending to establish in their minds the main fact in issue, and upon which they were to pronounce, to-wit: whether the possessor was the real thief; and that he did not leave it for them to say whether, from such recent unexplained possession, they were actually convinced in their consciences of the truth of the charge which was made against him. On the contrary, it appeared to me that the instruction, if to be understood as given by itself, and without comment or explanation, left for their consideration simply the

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question whether the possession was recent and unexplained, and this being found in the affirmative, the guilt of the accused followed as a presumption of law, and not as an inference of fact to be drawn by them. Such I deem to be the effect of the charge upon this point, as it stands isolated and alone in the bill of exceptions, and were I satisfied that the bill contains all that was said by the court to the jury upon that subject, and had the objection not been waived by the plaintiff in error, I should still be in favor of reversing the judgment for that reason, notwithstanding the many expressions to be found in the books, where such presumption is treated and spoken of as a presumption of law. For it seems to me evident, on such hypothesis, that the jury were not freely permitted to weigh and determine the force and efficacy of such possession as an evidence of guilt, as it was their province to do, but that the same was taken away from them altogether. The inaccuracy, if it be one, of calling it a presumption of law, finds sanction in the language of many of the courts and writers upon the subject of evidence. It is said that presumptions of this kind may be properly termed legal presumptions, because they have been so frequently drawn under the sanction of legal tribunals, that they are to be viewed as presumptions authorized by the law. *Smith vs. State*, 2 Iredell's Law R., 402; Burrill on Cir. Ev., 445; 1 Greenl. Ev., § 33; 1 Leading Crim. Cases, 360. Even Mr. Starkie, in his treatise, says that many merely natural presumptions "are recognized by the law, and therefore, in one sense, may be termed legal presumptions"; and he instances the one under consideration, that which arises from the recent possession of stolen goods. We cannot, therefore, say that the mere naming it a presumption of law in the charge to the jury was error. No specific instruction was asked by the counsel for the prisoner upon this point, nor does it appear that the attention of the judge was called to the form of expression adopted. Under these peculiar circumstances we think that if the prisoner's counsel desired to review it in this court, one or the other of these things should have been done. It is the constant practice of this court not to review or consider questions involved in the in-

structions given to the jury at the circuit, where, from the course pursued, we can see that the attention of the circuit judge was not fairly and explicitly called to them. If parties desire a reconsideration in this court, they must first see that there has been a consideration in the court below. From anything that appears in this record, the objection here urged was never brought to the notice of the judge, and we cannot review it. For this reason I think the judgment cannot be reversed on this point.

It furthermore appears, from the bill of exceptions, that the whole charge is not before us. It only purports to contain selected passages or sentences from it, leaving the residue out entirely. Under these circumstances, and from the peculiar nature of the objection urged, we think that instead of reversing the judgment for error, we would rather be bound to presume that the court, in treating it as a presumption of law, did its whole duty, and in the omitted portions of the charge explained to the jury the nature and extent of the presumption, informed them that it was for them to debate upon and determine its effect, and called their attention to those facts by which it might be weakened and overcome. At least we must suppose that the judge would have done so if requested, which he was not.

We need hardly add that the instruction asked by the counsel for the accused was properly refused. If given, it would have withdrawn from their consideration entirely the question of the unexplained possession of the property, and have declared to them that it did not constitute a circumstance, from which the defendant's guilt might have been inferred. It cannot be said that the power and efficacy of a mere natural presumption or inference of fact is destroyed or weakened because the line between two states or counties intervenes between the place where the larceny was committed and that where the stolen property is found immediately afterwards in the unexplained possession of some third person. Such inferences cannot from their nature be broken down or influenced by mere imaginary or geographical lines, or those forming the boundaries between different states or territories, and they can have no weight either in impairing or strength-

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ening the force which experience gives to facts, the existence of which is clearly established.

The judgment must be affirmed.

19 506
94 504

STATE ex rel. HARNEY vs. HASTINGS.

Sec. 61, chap. 320, R. S., 1858, authorized the commissioners of school and university lands to publish the list of forfeited lands lying in any county, in only one newspaper published in such county.

Said commissioners made an order for the publication of such list for a certain county, in a newspaper published therein by A, and notified A of said order, and requested him to do the work, but after such notice and request, a majority of the commissioners made and entered upon their book another order, directing the publication of said list in another paper, published in said county by B. No notice of the making of the second order, or of a revocation of the first, was given to A, who performed the work as directed and received payment therefor from the state. B published the list also, under the second order, and applied for a mandamus to compel the treasurer of state to pay his account therefor, which had been audited by the proper officer: *Held*, that the commissioners could not relieve the state from its contract with A, by revoking the first order without notifying him of the withdrawal of their proposition before he had accepted it.

Held, also, that it was not material whether A had actually notified the commissioners of his acceptance of their proposal to him, or had done any act of acceptance, before the second order was made, if he did accept their proposal within a reasonable time after it was made, and before he had any notice of its revocation.

Held, also, that B had no valid claim against the state for work done under such second order, that order having been made without authority of law.

APPLICATION for a Mandamus.

The case is stated in the opinion of the court.

Smith, Keyes & Gay, for relator.

J. H. Howe, Attorney General, for respondent.

October 16. *By the Court*, PAINE, J. This was an application for a mandamus to compel the treasurer to pay two accounts which had been audited in favor of the relator, one for publishing the list of forfeited school lands, and the other for publishing the list of forfeited swamp lands, in the county of Oconto, on the order of the school land commissioners. The return of the treasurer sets forth, that previous to the making of the order under which the relator did the work, another order had been made by the commissioners, directing that

the same work should be done by one Ginty, who, it is averred, published at that time the only paper published in that county. It is also averred, that this order was, before the making of the last one, transmitted to Ginty, and that it was duly accepted and acted on by him; that he did the work under it, and that his account for it had been regularly audited and paid. This return is demurred to, and the decision turns entirely on the question whether the two commissioners who made the last order, under which the relator acted, had any lawful authority to make it. If they had not, it follows from the views which this court has repeatedly expressed on that subject, that it was not binding on the state. Their authority is found in sec. 61, chap. 320, R. S., 1858, which requires them to advertise the list of forfeited lands in the newspaper published at Madison, in which the laws are published, "and also in a newspaper published in the county where the lands lie, if there be any." The commissioners then made an order that the publication for Oconto county should be done in the Pioneer. This order Ginty, the publisher of that paper, was notified of, and he was requested by the commissioners to do the work provided for. This, it clearly appears from the return, occurred before the making of the last order. The return also avers, that Ginty duly received, accepted and acted upon this request of the commissioners. But it may be doubtful whether it could be assumed from this, that he accepted the contract offered before the last order was made, though it is also expressly averred that the lists were delivered to his agents at Madison for publication, according to the order, before the making of the last one. But whether he actually notified the commissioners that he accepted the contract, or whether he actually did any act of acceptance before the last order was made, seems to us immaterial, provided he accepted it within a reasonable time, and before he received notice that the proposition or offer, on the part of the commissioners, was revoked. For we do not think that after they had notified him of the order, and requested him to do the work, they could relieve the state from the contract by merely revoking the order, without also notifying him, and withdrawing their proposi-

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tion, before he had accepted it by entering upon the work or otherwise. There is no allegation that he was notified of any other order, or that the request to him to do the work was ever withdrawn, but he did in fact enter upon and perform the work according to the order, and the secretary of state, who was one of the commissioners who made the last order, audited and allowed his account therefor. It is clear, therefore, that the state was bound whenever he accepted the proposition of the commissioners, either by entering upon the work, or in such other manner as its terms could be fairly held to require. And they could only restore their power to make a contract with another party, by taking the necessary steps to revoke their order to him before it was accepted by him so as to become a binding contract. Even if the last order, therefore, could be construed into a revocation of the first, it failed to prevent the contract with Ginty from becoming effectual for want of notice to him. The power of the commissioners, when they had made a binding contract, was exhausted, and could be revived only by that contract being rescinded, or the failure of the party to perform. For the statute gives them the power to advertise in only one newspaper in the county, and when they had once bound the state for that, they had no power to bind it further. Otherwise, under a power to publish in one paper, they might publish in twenty. Such a doctrine can only be sustained upon the assumption that where the law gives such officers certain powers, they may exercise others not given, as effectually as those that are.

It may be a case of hardship, if the relator was unaware of the fact that the commissioners had already exhausted their power by making a valid contract with another party. But that cannot change the law, nor enlarge the power of the commissioners so as to enable them to publish in two papers, when the law says they may publish it in one only. It must fall, therefore, within the repeated decisions of this court, that the acts of officers beyond their lawful authority, can create no legal claim against the state, and none which the secretary has authority to audit.

The demurrer to the return must be overruled.

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77	31
77	35
12	508
86	296
12	508
108	814

All moneys belonging to a county as such, and not held by it in trust, constitute one fund, out of which all its liabilities are to be paid.

Where a county order which directed the treasurer of the county to pay the amount thereof "out of the unappropriated money belonging to said county for jail purposes," had been duly presented for payment: *Held*, that the owner was entitled to payment thereof out of any funds belonging to the county, prior to the payment of any county orders subsequently presented.

Before the adoption of the Code of Procedure, a court of equity would interfere, by injunction or otherwise, to restrain or control the proceedings of subordinate tribunals, or the official acts of public officers, only when such acts or proceedings affected real estate, and would lead to irreparable injury to the freehold, or to the creation of a cloud upon the title, or where they would lead to a multiplicity of suits; and the Code has not enlarged the power of such courts in this respect, except in reference to temporary injunctions during the pendency of a litigation, which may now be granted, whether the action was formerly denominated legal or equitable.

A person who holds a county order, is a mere creditor *at large* of the county, and until judgment is rendered thereon, and execution returned unsatisfied, cannot, by injunction or otherwise, disturb the county in the exercise of its general right to dispose of its property.

APPEAL from the County Court for *La Crosse* County.

The case is stated in the opinion of the court.

Hugh & Alex. Cameron, for appellant, contended that the orders held by the respondent were payable only out of the jail fund of the county, and that it did not appear from the complaint, how that fund was to be furnished with money to meet demands upon it, or how the respondent was injured by the payment of orders filed subsequently to his own.

2. The Code has not enlarged the power of the courts to grant permanent injunctions. *N. Y. Life Ins. Co. vs. N. Y. City*, 4 Duer, 192; *Neustadt vs. Joel*, 2 id., 530. 3. Courts will restrain a public officer by injunction only where his official acts, affecting the title to real estate, may result in irreparable injury to the freehold, or where such acts would lead to a multiplicity of suits. *Mayor, &c., of Brooklyn vs. Meserole*, 26 Wend., 132; *Wiggin vs. Mayor, &c., of N. Y.*, 9 Paige, 16; *Van Doren vs. the same*, id., 388; *N. Y. Life Ins. Co. vs. N. Y. City*, *supra*. 4. County orders are merely contracts of the county to pay as therein stated. A court of equity will not interfere to prevent a breach of such a con-

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tract. *Weale vs. West Middlesex Water Works Co.*, 1 Jac. & Walk., 370. 5. The respondent was merely a creditor at large of the appellant, and as such not entitled to equitable relief. *Wiggins vs. Armstrong*, 2 John. Ch. R., 144; *Neustadt vs. Joel*, 2 Duer, 530; *Hastings vs. Belknap*, 1 Denio, 190; *Andrews vs. Durant*, 18 N. Y., 500.

Angus Cameron and Abbott, Gregory, Pinney & Flower, for respondent, contended that the orders described in the complaint were payable out of the general fund of the county, the words "for jail purposes" inserted therein being merely descriptive of the purpose for which they were drawn; and that the plaintiff's orders were entitled by law to payment before those subsequently presented. Sec. 129, chap. 13, R. S.; *Keep vs. Fraser*, 4 Wis., 224. 2. Secs. 1 and 2 of chap. 129, R. S., greatly enlarge the powers of the court in the granting of preliminary injunctions. *Cure vs. Crawford*, 5 How. Pr. R., 293; *Furniss vs. Brown*, 8 id., 59. 3. Courts of equity will sometimes protect a party by injunction, when he might maintain an action at law. *Furniss vs. Brown*, *supra*; *Goodrich vs. Moore*, 2 Minn., 61; *Douglas vs. Wiggins*, 1 John. Ch. R., 435; 2 Eden on Inj., 341-2. The complaint in this case makes a proper case for granting relief by injunction. 1 Eden on Inj., 337; *In re Hemip*, 2 Paige, 316; *Cure vs. Crawford*, *supra*; *Bruce vs. Del. & Hud. Canal Co.*, 19 Barb., 371. The court will restrain a public officer by injunction when his official acts will lead to a multiplicity of suits. An action may be maintained on each order (*Savage vs. Supervisors of Crawford Co.*, 10 Wis., 49), and it is alleged in the complaint, and admitted by the demurrer, that the plaintiff's orders will remain unpaid unless the injunction should be granted.

October 22.

By the Court, DIXON, C. J. The record in this case embraces two appeals from two orders, made by the county court of the county of La Crosse. One was an order overruling the appellant's motion for an order to dissolve an order for a temporary injunction, which had previously been made in the case, upon the facts set forth in the complaint, accompanied by a verification in the usual form, and the other

an order overruling the appellant's demurrer to the complaint. The causes of demurrer assigned, were: First, that it appeared on the face of the complaint that the court had no jurisdiction of the action; and, second, that the complaint did not state facts sufficient to constitute a cause of action. The complaint is somewhat lengthy, but the facts alleged in it, and which are necessary for a proper understanding of the questions raised, may be comprehended in a few words. The appellant is the treasurer of the county of La Crosse, and the respondent the owner of sundry orders issued by the proper authorities of that county, and which are evidences of an indebtedness from the county to him as the holder, in the several sums therein specified. These orders, which are ten in number, and amount in the aggregate to the sum of \$700, were issued in the months of March, June, July and August, 1859, to one Alexander W. Shepard, or bearer, and are in the usual form of such instruments, except that the treasurer of the county, to whom they are directed, is required to pay them out of the unappropriated money belonging to the county for jail purposes. The complaint shows that they were all presented for payment, and payment demanded of the defendant, as such treasurer, on or before the 2d day of December, 1859, and that, payment thereof having been refused, they were severally, on and before said last mentioned day, placed on file with the treasurer, and thus remained until the time of the commencement and hearing of this action. It further appears that no part of the money due upon them has ever been paid or offered to the respondent. It is not averred that there were, at the time such orders were so presented for payment, nor that there have been at any time since they were so placed on file, any moneys in the hands of the respondent which were properly applicable to their payment and liquidation; but it is alleged as a reason why no such moneys have come into his hands as treasurer, and as a substantive ground or cause for maintaining this action, that the appellant, as treasurer, has, during the time said orders have so been on file, been guilty of certain continued acts of official misconduct or malfeasance, which have resulted in preventing the receipt

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of the ordinary income and revenue of the county, and in keeping the treasury continually empty. This misconduct is charged to have occurred in this wise. It is said that at the time of making the complaint, the treasurers of the several towns had made return to the county treasurer, of the delinquent taxes in their respective towns, assessed in the year 1859, and that those taxes, so assessed and returned, and then in the hands of the county treasurer for collection, amounted to at least \$9,000. It is also said that large quantities of land in said county were sold by the treasurer thereof, in the years 1857, 1858 and 1859, for the delinquent or unpaid taxes assessed thereon for the year preceding such sales respectively, and that of such lands a large portion was bid off by and in the name of the county, and certificates thereof issued to the county, and that of such certificates a large number were owned and held by the county at the time of the filing of the respondent's said orders, and that many of them were still, at the time of the institution of this suit, so held and owned. The plaintiff then proceeds to allege, by way of laying the foundation for a perpetual as well as a temporary injunction, that the principal or only sources of revenue of said county, by which its treasury can be replenished and the necessary funds accumulated therein, with which to pay his said orders, are the moneys which are due and unpaid to it for said taxes and upon such tax certificates; but that the defendant, as such treasurer, instead of demanding and receiving the cash in payment of such delinquent taxes, so far as the same were levied and assessed for county purposes, and instead of requiring a like cash payment upon the redemption, sale or transfer of such certificates of sale, has been in the habit, during all the time said orders have so remained on file, and still is in the habit and practice, from day to day, and week to week, and so often as he is applied to for that purpose, of receiving such payments in the outstanding, unfilled orders of said county, without regard to the date or time of their issue, or the purposes for which they were given; and that, in pursuance of such practice, he has so received in payment many orders of like tenor and effect of those held by the plaintiff, and which were

issued to the said Alexander W. Shepard, and which were never otherwise presented for payment, or placed on file with him. The complaint closes with a prayer for a temporary injunction, and that on the final hearing a perpetual injunction may be awarded, restraining the defendant, his agents, attorneys, counsellors, deputies, successors, &c., from receiving such outstanding unsatisfied orders in payment of any part of said delinquent taxes, or in redemption, or for the transfer or sale, of said tax certificates, until moneys sufficient to satisfy the orders of the plaintiff, according to their dates and priority of filing, shall have been paid and received into the treasury of said county.

The first objection of the appellant's counsel, that the orders described in the complaint are drawn payable out of a particular fund, viz: the unappropriated money belonging to the county for jail purposes, and that therefore the promise to pay is contingent upon the sufficiency of that fund, seems to me not to be well taken. Upon examination of the statute, I find no authority for the creation of separate or distinct funds out of the revenues or moneys belonging to the county. By law all money belonging to the county as such, and not coming into its hands in the capacity of trustee, is treated as one fund, out of which all its liabilities are to be discharged. This intention is most plainly indicated by the provisions of sec. 129, chap. 13 of the Revised Statutes, which provides that "county orders properly attested," (thereby, of course, meaning and including all county orders), "shall be entitled to a preference as to payment according to the order of time in which they may be presented to the county treasurer," except that where two or more orders are presented at the same time, that shall be first paid which is of the oldest date; and provided that the county treasurer shall receive from town treasurers all county orders issued by said county, in payment of the county taxes collected in such town by the town treasurer, in the year for which such orders are offered in payment. If it be conceded that the instruments in question are the orders of the county of La Crosse—and this was not denied or disputed—then I do not see how, under the operation of this section, their payment, according to the

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order fixed by it, and out of any funds properly belonging to the county, could well be refused. It could only be done on the hypothesis, which was not claimed or insisted upon, that the addition of the words "*for jail purposes,*" destroyed their character and existence as orders. There being no authority to establish a separate fund, and these orders being payable, if at all, out of the general fund, those words must be understood, not as a limitation upon the liability of the county, but as descriptive of the purpose for which the order was drawn, and as introduced, in order the better to enable the officers of the county to regulate and adjust its financial affairs.

Upon the question of the jurisdiction of a court acting as a court of equity, to grant a permanent injunction in a case like the present, where such injunction is the only relief demanded in the complaint, it seems to me very clear, if the court is to be governed by the law as it existed and was administered prior to the adoption of the Code of Procedure, that it has no such power or jurisdiction. By the law as it then stood, it was well settled that a court of chancery would interfere, by injunction or otherwise, to restrain or control the proceedings of subordinate tribunals, or the official acts of public officers, in but two instances. The one was where such proceedings or acts affected real estate, and would lead to irreparable injury to the freehold, or to the creation of a cloud upon the title, which the court, if called upon, would remove; and the other, where they would lead to a multiplicity of suits. In the one case the court would interfere to stay the mischief; and in the other, to avoid vexatious and excessive litigation. *Mayor of Brooklyn vs. Meserole*, 26 Wend., 132. It is very evident that the present case falls within neither of these heads of equitable jurisdiction. In the case of *Mooers vs. Smedley*, 6 John. Ch. R., 28, where a bill was filed to enjoin the collector of a town from collecting a tax, and the supervisor from paying over the same when collected, on the ground that the board of supervisors had levied it in direct violation of law, Chancellor KENT observed: "I cannot find, by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a

court of equity, to review or control the determination of the supervisors, in their examination and allowance of accounts as chargeable against their county, or any of its towns," but that "the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belongs to the supreme court. In my opinion, it belongs exclusively to that court. It has always been a matter of legal and never a matter of equitable cognizance;" and that "in the whole history of the *English* court of chancery, there is no instance of the assertion of any such a jurisdiction as is now contended for." See also *Wiggin vs. The Mayor*, 9 Paige, 16; and *Van Doren vs. Same*, id., 368.

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Upon the point that the Code has not enlarged, or in any respect changed, the power of the court to grant injunctions in cases of this kind, I am equally well satisfied. The only provision from which any such enlargement or change can be claimed, is that found in section 2 of chap. 129 of the Revised Statutes, transcribed from sec. 219 of the Code of New York, and is in these words: "Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or where, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." It is very clear that the remedy here given, and which is extended to all actions, whether they be such as were heretofore denominated legal or equitable, is temporary and provisional in its nature, and designed to pass away when the litigation itself ceases by the rendition of a final

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judgment in the action. It is also clear, that no new or enlarged rights are conferred upon the plaintiff, but that it only enlarges the powers of the courts to grant injunctions, in cases where, by the complaint, it appears that he is entitled to the relief demanded. In determining whether he is entitled to such relief, or whether or not he sets forth a good cause of action, we are to look to the law as it was previously understood and expounded. The legislature have not attempted to change or modify the law which fixed and governed the right, but that which concerned the remedy only. And if, by the law as heretofore established, the plaintiff had not the right to a perpetual injunction in a case like the present, then he has not now. Nor does the fact, that by the Code all distinction between the forms of legal and equitable proceedings has been abolished, and that they have been blended into one general, harmonious system, nor that the legal and equitable powers are now united in, and exercised by, the same courts, at all affect the question. In so doing the legislature has not obliterated or destroyed the limits which were heretofore set to those powers, and by which they were distinguished and defined, and their exercise circumscribed. We cannot therefore substitute an equitable for what was heretofore purely a legal remedy, or the opposite. We cannot make the writ of injunction perform the functions of a mandamus or action on the case.

The objection that the plaintiff is merely a creditor at large, or before judgment, of the county of La Crosse, and therefore not entitled to the interference of the court by injunction, is, in my opinion, equally fatal to the present proceeding. The authorities cited by the appellant's counsel to this point, abundantly establish, that before judgment and execution issued and returned unsatisfied, such general creditor cannot in this manner question or control the debtor's disposition of his property, upon the ground of fraud or otherwise. He must complete his title at law, by judgment and execution, before he can interrupt the debtor's general rights to dispose of and control his property. In respect to the powers of a court of equity, the county, in the absence of any inconsistent statutory regulations, would occupy the

same position as a natural person, and although it might be inequitable and unlawful for it to violate or disregard the preferences given by statute, that court could not interfere. The plaintiff must resort to the remedies given by law.

Both the orders of the county court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

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SPAULDING VS. MILWAUKEE & HORICON RAILROAD CO.

Where the mortgagees of the road and other corporate property of a railroad company, commenced a suit for the foreclosure of their mortgage, and at the same time obtained an order from the court in which such suit was brought, appointing a receiver to take possession of the road and other property of the corporation, and operate the road during the pendency of such suit, and an appeal was taken from the order appointing such receiver, by the company and others in possession of the road, and the proceedings in the circuit court stayed by the execution of a proper undertaking for that purpose, and, before the decision of such appeal in this court, said mortgagees directed the clerk of the circuit court to enter a discontinuance of the foreclosure suit, at their costs, and served a copy of the order of discontinuance upon the defendants in that suit, with notice that the suit was discontinued at the plaintiffs' costs, and offered to pay the defendants all their costs upon presentation of a taxed bill thereof, and also to appear before any taxing officer, at such time as the defendants might designate, to attend to the taxation of the same, and stipulated in said notice that the order of the circuit court appointing a receiver, from which said appeal had been taken, might be rescinded and cancelled at the plaintiffs' costs, and also offered to pay the costs of the appeal upon presentation of a taxed bill thereof: *Held*, that even if the circuit court still retained jurisdiction of the case, so that it might make an order therein for the protection of the rights of all the parties (a question this court does not decide), still the plaintiffs therein could claim no further benefit from such suit, but must go out of that court upon such terms as the court might see fit to impose.

Held, also, that the appeal to this court would fall upon the discontinuance of said suit in the circuit court, and that an application of the company to this court for an injunctive order, forbidding certain persons who had, after said appeal, obtained possession of the road and were operating it by virtue of certain legal proceedings in the U. S. District Court, from interfering with or exercising any control over said road, could not be granted.

APPEAL from the Circuit Court for *Washington* County.
In this case an application was made by the respondent

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for an injunctional order, the nature of which application, and the grounds upon which it was made and was resisted, will appear sufficiently from the opinion of the court.

A. D. Smith, for appellant.

Butler, Buttrick & Cottrell, for respondent.

October 24.

By the Court, COLE, J. It appears to us that the respondents have shown good cause why there should be no stay of proceedings granted herein, as asked for by the appellants. The suit was originally commenced in the Dodge circuit court, by the respondents, to foreclose a mortgage given upon the railroad and corporate property, to secure the payment of first mortgage bonds, and the interest upon the same. It was alleged in the complaint that the corporation was in a condition of insolvency, and that the mortgaged premises were a scanty security for the mortgage debt, and, among other things, it was asked that a receiver be appointed to take possession of the road, and the property and the franchises of the corporation, and run and operate the road, pending the suit. A receiver was appointed in conformity with the prayer of the complaint. The company and others in possession of the railroad, being dissatisfied, took an appeal from the order appointing a receiver, and gave an undertaking in the sum of two hundred and fifty dollars, conditioned according to law, and a further undertaking in the sum of ten thousand dollars (that being the sum fixed by the judge of said court), and conditioned in conformity with chapter 139 of the General Laws of 1859, to stay proceedings in the circuit court. And the appellants now ask that an injunction may issue, enjoining Joseph B. Ficklin, Levi Blossom, Lindsay Ward, Robert H. Lowery and others, from interfering with, or exercising any authority over, the railroad and its franchises. Some of these parties have obtained possession of the railroad, and are operating the same under and by virtue of certain legal proceedings, instituted in the United States district court, but to which it is not necessary more particularly to refer. The respondents, in answer to the rule to show cause why proceedings should not be stayed, produce a copy of an order which they, as attorneys for

the plaintiffs, directed the clerk of the circuit court of Dodge county to enter, discontinuing the suit commenced in that court for the foreclosure of the mortgage above named, at the costs of the plaintiffs therein. They also show that a copy of this order was served upon the appellants, with a notice that the suit had been discontinued at the plaintiffs' costs, and the counsel for the respondents offer, in their notice, to pay the appellants all of their costs in said action, upon presentation of a taxed bill thereof; also to appear, with or without formal notice, before any taxing officer, at such time as the appellants might designate, for the purpose of attending to the taxation of the same; and further, they stipulate in the notice that the order of the circuit court, appointing the receiver in the action, and which had been taken to this court on appeal, might be rescinded and cancelled at the costs of the respondents; and they offered to pay the costs of the appeal, upon presentation of a taxed bill thereof.

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Under these circumstances, it is very clear to our minds that we ought not to grant an injunction to stay proceedings under this appeal. The respondents have endeavored to discontinue the foreclosure suit in the Dodge circuit court, and have stipulated that the order made in that suit, appointing a receiver (which has been appealed to this court), might be rescinded and annulled. Now, whether the suit was absolutely out of court, when the respondents' counsel entered the order of discontinuance with the clerk of the Dodge circuit court, and gave notice thereof, with an agreement to pay all costs to the adverse party, upon presentation of a taxed bill thereof, so that the Dodge circuit court had no further jurisdiction over the same, and could make no order therein for the protection of the rights of all parties, and such as the justice and equity of the case might seem to require, is a question not necessary to be decided at the present time. It is said to be a matter of course, to permit a complainant to dismiss his bill at any time before interlocutory or final decree has been made in the cause, upon payment of costs. *Cummins vs. Bennett*, 8 Paige, 79; *Saxton vs. Stowell*, 11 id., 526; *Simpson vs. Brewster*, 9 id., 245; *James vs. Delavan*, 7 VOL. XII—39

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Wend., 511; *Smith vs. White*, 7 Hill, 520; *The Seaboard & R. R. Co. vs. Ward*, 18 Barb. (S. C.), 595; *Averill vs. Patterson*, 10 How. Pr. R., 85; *Schenck vs. Fancher & Long*, 14 id., 95. Whether there is any thing in the circumstances of this case which would take it out of the operation of this general rule, it becomes immaterial to inquire. The counsel for the appellants contends that there is. He insists that ordinarily a case in the attitude of, and like the one at bar, could not be absolutely dismissed from the jurisdiction of the circuit court, by merely entering an order of discontinuance with the clerk in vacation, and offering to pay the costs of the adverse party, but that there must be some action of the court itself, dismissing the cause, and that the case is still pending in the circuit court of Dodge county. It may be conceded that this position is correct, that the Dodge circuit court still retains jurisdiction of the foreclosure suit, notwithstanding the efforts of the plaintiffs to discontinue it, and that that court can make any proper order therein which may be necessary to protect the rights of all parties, and yet that this application for a stay of proceedings should be denied. It does not follow that because the Dodge circuit court may have jurisdiction of the foreclosure case for certain purposes, or because the appeal from the order appointing the receiver may still be pending in this court, that we should enjoin parties from interfering with the subject matter of the appeal, namely, the railroad and its property and franchises, in other cases. Certainly the circuit court would not permit the plaintiffs further to prosecute the foreclosure suit, in that court, after discontinuing it by entering the order with the clerk. The court would not treat them as being in court and out of court at the same time. It would not suffer its proceedings thus to be trifled with, even if parties were disposed thus to back and fill, and to vacillate in the conduct of a suit. So that the respondents can claim no further benefit or advantage from the foreclosure suit in the circuit court. They must, at all events, go out of court upon such terms as the circuit court may see fit to impose, if they are not out already. The appeal in this court would fall, as a matter of course, with the principal cause. And such being the case,

we think the rule requiring the respondents to show cause why an injunction should not issue herein, must be discharged, with costs.

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BOND and others vs. WILTSE and another.

A and others delivered to the treasurer of a railroad company their note for \$5,000, payable to his order, at six months after date, upon an express agreement with said company, that the note should be negotiated and its proceeds applied solely to the purchase of iron for said road, in whose early completion they were interested; but before the maturity of said note, the company borrowed \$2,000 from B, (no part of which was used in the purchase of iron), and indorsed and pledged to him said note for \$5,000, as security for its repayment. The loan not being repaid when it fell due, B gave notice that he would sell said note of \$5,000, at public sale, for the purpose of raising the amount of said loan: *Held*, that B, to the extent of the loan made by him on the credit of said note, without notice of facts impeaching its validity, was a *bona fide* holder for value, and that a complaint by the makers of said note, stating the facts and praying that B might be enjoined from selling said note, and that as to any liability of the makers thereof to B, it might be declared void, was bad, on demurrer.

APPEAL from the Circuit Court for *Kenosha* County.

The case is sufficiently stated in the opinion of the court. The co-defendant of *Wiltse* was one Tymeson, whose name was signed, as auctioneer, to the advertisement by *Wiltse* of the sale of the note for \$5,000, pledged to him as security for the loan of \$2,000.

Mat. H. Carpenter & Gridley, for appellants:

1. *Wiltse*, having taken the note of the respondents, without notice of the purposes for which it was made, as a security for the payment of an indebtedness not pre-existent, but contracted at the time of such taking, is a *bona fide* holder for value. *Bay vs. Coddington*, 20 John. R., 637; *Bank of Salina vs. Babcock*, 21 Wend., 499; *Bank of Sandusky vs. Scoville*, 24 id., 115; *Mohawk Bank vs. Corey*, 1 Hill, 513; *Stallcr vs. McDonald*, 6 id., 98; *Montross vs. Clark*, 2 Sandf. S. C., 115; *White vs. Springfield Bank*, 3 id., 222; *Young vs. Lee*, 2 Kern., 551; *White vs. Springfield Bank*, 1 Barb., 225; *Seneca*

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BOND et al. *Scott vs. Betts*, Hill & Denio, 363; *Agawam Bk. vs. Strever*, 18
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WILTSE et al. N. Y., 506. 2. The note of respondents was delivered to the railroad company "to be negotiated and sold," without restrictions as to the manner of negotiation, or the amount of money to be raised thereon, and the note having effected the substantial purpose for which it was designed, the obtaining of money by the R. R. Co., the subsequent diversion of the money cannot effect the validity of the note in the hands of Wiltse. *Powell vs. Waters*, 17 John., 176; *Bank of Chenango vs. Hyde*, 4 Cow., 567; *Bank of Rutland vs. Buck*, 5 Wend., 66; *Wardell vs. Howell*, 9 id., 170.

O. S. & F. H. Head, for respondents :

1. In a suit against the railroad company, the original holder of the note, the respondents would have been entitled to the relief demanded in the complaint. 2 Story's Eq. Jur., §§ 10, 11; *Reed vs. Bank of Newburgh*, 1 Paige, 215. 2. Wiltse, having taken the note merely as collateral security, did not acquire the rights of a bona fide purchaser, before maturity, for a valuable consideration. *Bay vs. Coddington*, 5 John Ch. R., 54, and 20 id., 637; *Stalker vs. McDonald*, 6 Hill, 93; *Payne vs. Cutler*, 13 Wend, 606-7; *Rosa vs. Brotherton*, 10 Wend., 85; *Williams vs. Little*, 11 N. H., 66; *Clark vs. Ely*, 2 Sandf. Ch. R., 166; *Kirkpatrick vs. Muirhead*, 16 Penn. St., 123; *Bertrand vs. Barkman*, 8 Eng. (Ark.), 150; *Jenness vs. Bean*, 10 N. H., 266; *Prentice vs. Zane*, 2 Gratt., 262; and *Bramhall vs. Beckett*, 31 Me., 205.

November 19. *By the Court*, COLE, J. A demurrer was filed to the complaint in this case, on the ground that the same did not state facts sufficient to constitute a cause of action. The circuit court held the complaint good, and from the order overruling the demurrer this appeal is brought. We are, however, of the opinion that the demurrer was well taken, and that it should have been sustained.

Without attempting to give the complaint at length, we will say that, according to our understanding of it, it discloses the following facts: On or about the 5th day of May,

1857, the respondents made and delivered to one Z. G. Simmons, the treasurer of the Kenosha & Rockford Railroad Company, their joint and several promissory note, for five thousand dollars, payable to the order of said Simmons, six months after date. It is alleged that the note was made and delivered with the express and positive understanding between the makers and the company, that the note was to be negotiated, and the proceeds thereof applied to the purchase of iron to aid in the construction of the road. About the 14th of May, 1857, the railroad company borrowed two thousand dollars of the appellant *Wiltse*, and gave therefor the promissory note of the company, signed by the treasurer thereof, and pledged the note made by the respondents, as security for the payment of the two thousand dollar note of the company; and all this was done without the knowledge or consent of the makers. As the note of the company was not paid according to its terms, *Wiltse* gave notice, through a newspaper of Kenosha, that he would proceed and sell the five thousand dollar note, indorsed and pledged to him, for the purpose of raising money to pay his debt. And the respondents ask that *Wiltse* be enjoined from selling the note thus advertised, or disposing of it in any manner, until the further order of the court, and that the note, so far as concerns any liability of any or either of them to the holder, *Wiltse*, may be adjudged null and void.

In the elaborate opinion delivered by Mr. Justice STORY, in the case of *Swift vs. Tyson*, 16 Peters, 1, he seemed to affirm the doctrine that the holder of a negotiable instrument, who had taken it *bona fide* for a valuable consideration, in the ordinary course of business, before due, and without notice of facts which impeached its validity, as between the antecedent parties, had a title unaffected by those facts, and could recover on the instrument, although it might be without any legal validity as between the antecedent parties; and that where the note is received in payment of a pre-existing debt, or is taken as collateral security for a precedent debt, the person receiving it should be treated as a *bona fide* holder for value, within the meaning of this rule. And this doctrine he subsequently lays down in his work on Promissory Notes,

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§ 195. It is probable that the court, in the case of *Swift vs. Tyson*, understood and supposed that the plaintiff received the drafts and acceptances in that case mentioned, in absolute payment of the protested note of Norton & Keith, which he had previously paid to the Marine Bank, and that the consideration for the transfer of the acceptances was the extinguishment of the protested note, and all action upon it. Such seems to have been the understanding of Mr. Justice CATRON, of the question presented by the record and decided by the court; and with this explanation, the case is not opposed to so many adjudged cases as it would be if it were understood as deciding that the plaintiff was a *bona fide* holder for value, even if he received the acceptances merely as collateral security for an existing debt, the right of action on the original debt not being altered and gone. For it is held in many of the states of the union—and the doctrine seems to be sustained by much good sense and sound reason—that a note or bill taken in satisfaction or discharge of an existing debt, puts the indorsee in the situation of a holder for value, and entitles him to recover upon it without regard to the equities subsisting between the maker and indorser. But it is unprofitable to pursue this discussion further, since it has no controlling effect upon the question arising upon this demurrer. The numerous authorities bearing upon the point as to whether a pre-existing debt may constitute a valuable consideration, within the rule of the *law merchant*, may be found collated and examined in the notes to *Swift vs. Tyson*, 1 American Leading Cases, 335, and *Depeau vs. Waddington et al.*, 2 id., 104.

However, as to the question arising upon this demurrer, we would say that we suppose the doctrine quite well established, that where some new consideration intervenes at the time of receiving the paper, as when advances have been made or responsibilities incurred upon the credit of it, that then the party is considered a *bona fide* holder for value, within the rule for the protection of commercial paper. *Bay vs. Coddington*, 20 John., 637; *Stalker vs. McDonald*, 6 Hill, 93. And the rule seems just and reasonable, which protects the holder of commercial paper, who has acquired it fairly,

in the usual course of business, before maturity, by giving his money, goods or other property upon the strength of it. Why should not the holder be protected, who receives paper under such circumstances? He parts with value for it, and gives a valuable consideration. In the present case it is more than probable that *Wiltse* would not have loaned the railroad company the two thousand dollars, except upon the credit of the five thousand dollar note. He may have known that the corporation was unable to meet its engagements, and that he must look to the collateral security alone to obtain his money. Why, then, should he not have the benefit of this security? The respondents allege, in their complaint, that they made and delivered the note to the railroad company to be negotiated and sold, and the proceeds to be applied to the purchase of iron to complete the road. What right have they now to complain because the note was negotiated and sold? What if the railroad company did pledge it to secure the payment of two thousand dollars, and no more? Wherein are the makers injured by this transaction? Suppose the company pay *Wiltse* the amount of the note which it gave him, then it will be entitled to the security pledged. Suppose he is compelled to go on with the sale, the object of the sale is to realize therefrom the debt owing him from the company. And upon what principle of law or justice the respondents can claim that their note shall be adjudged null and void, and not be available to *Wiltse*, even to secure the payment of the money he gave upon the strength of it, we are somewhat at a loss to understand. Having parted with his money upon the faith and credit of this security, as we think the complaint shows, the appellant would undoubtedly be entitled to hold it even as against equities which might exist between the immediate parties to the paper, if any such there were. But even this complaint does not disclose the fact that such equities existed. In its origin, it was intended that the note should be used by the railroad company for the purpose of raising money. The makers made and delivered it for that declared object. And now, after the note has been put in circulation according to the design of the parties who made it, and after a third party

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has made advances to the railroad company upon the faith and credit of the paper, for a court to interpose and declare the note void, would be inequitable and unjust.

We therefore think that the demurrer to the complaint should have been sustained. The order overruling the demurrer is reversed, and the cause remanded for further proceedings, according to law.

NOTE.—It has been held that the *implied* authority of a creditor to sell the property pledged to him as collateral security, if the debt remains unpaid, does not extend to *chooses in action* created by private individuals and having no market value. *Wheeler vs. Newbould*, 5 Duer, 29. In the absence of a special power for that purpose, the pledgee cannot, on default and notice to the pledgor, sell such paper either at public or private sale, but must hold it and collect when due, and apply the proceeds to the debt. Nor will proof of a local custom so to sell, be allowed. *Same case*, 16 N. Y., 892.—R&P.

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Where a municipal corporation is created without any express restriction upon its power to levy taxes or raise money, it can exercise that power only for legitimate municipal purposes, the power of the corporation in that respect being limited by the object and purpose of its creation.

The legislature cannot confer upon a municipal corporation an *unlimited* power to levy taxes and raise money, aside from and above what may be necessary and proper for legitimate municipal purposes; the grant of such unlimited power being inconsistent with section 8, of Article XI, of the constitution, which requires that the legislature, in organizing such corporations, "shall restrict their power of taxation, assessment, borrowing money, contracting debts," &c.

That section of the constitution does not contain a grant of power to the legislature to organize cities, but is a restraint upon that power.

A provision in the charter of a city that no tax shall be levied or money be borrowed beyond what may be needed for legitimate municipal purposes, without the previous sanction of a majority of the voters, is not a limitation upon its power to levy taxes or contract debts, within the meaning of that section of the constitution. The duty of imposing the proper limitation belongs to the legislature, and cannot be transferred to others.

An amendment to the charter of the city of Kenosha, declared that the city council should have power to levy and collect special taxes for any purpose (aside from what was specially provided for in the original charter), which might be considered essential to promote or secure the common interest of the city, or might borrow on the corporate credit of the city for such pur-

poses, any sum of money for any term of time, &c., but that no such tax should be levied or money borrowed, except in accordance with a section of the original charter, which provided that no such tax should be levied, or money be borrowed, without the consent of a majority of the voters, who should vote upon the question at a special election to be held for that purpose. Afterwards the city of Kenosha subscribed \$150,000 to the stock of the Kenosha and Beloit Railroad Company, in pursuance of the vote of a majority of the legal voters of said city, and issued scrip to the amount of \$66,000 in part payment therefor, and levied a tax to provide for the payment of said scrip. In a suit by a tax-payer in said city, to restrain the collection of said tax, it was held, that said amendment to the charter of said city was in conflict with section 8, of Article XI, of the constitution; that the act of the city council in creating said debt, was unauthorized, and that the collection of said tax should be restrained.

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Whether it follows that the scrip so issued is void, the court does not, in this action, determine.

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This was an action to enjoin the city of Kenosha from collecting a certain tax levied upon real estate in said city for the purpose of paying scrip issued by said city upon its subscription of \$150,000 to the stock of the Kenosha and Beloit Railroad Company. A temporary injunction having been granted, on the application of the plaintiff, and the defendant having filed a motion to dissolve such temporary injunction, the court, after a hearing, made an order denying the motion, from which the defendant appealed.

Head & Lynde, for appellant, contended that the legislature has a right, with the consent of the local authorities, to tax a particular city or locality for the construction of a local improvement (*Weeks vs. City of Milwaukee*, 10 Wis., 242; *Soens vs. City of Racine*, id., 271); and that under sec. 44 of the "act to incorporate the city of Kenosha," and sec. 8 of the act to amend the same, the city had power to levy the tax in question. *Nichol vs. Mayor, &c., of Nashville*, 9 Humph., 266; *L. & N. R. R. vs. The County Court of Davidson County*, 1 Sneed, 640.

F. S. Lovell, for respondent, contended that sec. 8 of the "act to amend the charter of the city of Kenosha," approved March 23, 1853, as it purported to confer upon the city unlimited power to levy taxes and borrow money, was in violation of sec. 3, art. XI, of the constitution of this state.

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By the Court, COLE, J. This complaint was filed by the respondent on his own behalf, and on behalf of other land owners, to restrain the city of Kenosha from collecting a special tax of \$18,625, levied by the city upon the real estate therein situated, for the purpose of paying a debt originally contracted by the stock subscription of the city to the Kenosha & Beloit R. R. Co. This subscription was made under and by authority of section 8 of an act to amend the charter of the city of Kenosha, and of section 44 of the charter, and also by virtue of an ordinance of the common council, submitting the question to the legal voters, whether a tax "of one hundred and fifty thousand dollars should be levied and collected, for the promotion of the common interest of the city, in aid of the Kenosha & Beloit Railroad," &c., and authorizing the mayor to subscribe, in the name of the city, that amount, to the capital stock of the company, provided a majority of the legal voters was in favor of such tax.

The counsel for the respondent contends that section 8 of the act to amend the charter of the city (which is above referred to,) is unconstitutional, and as a necessary consequence, that the action of the common council under that section, was unauthorized and void. This section, he insists, is in conflict with section 3, art. XI of the constitution, and such is our opinion. That provision of the constitution reads as follows: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts, by such municipal corporations." Section 8 of the act amending the charter reads: "The city council shall have power to levy and collect special taxes for any purpose (aside from what may be specially provided for in the city charter), which may be considered essential to promote or secure the common interest of the city, or may borrow on the corporate credit of the city, for such purposes, any sum of money, for any term of time, at any rate of interest not exceeding ten per centum, and payable at any place that may be deemed expedient

Bonds or scrip may be issued therefor under the seal of the corporation, and the resources and credit of the city are pledged for the repayment of the sums so borrowed, with the interest on the same. All such moneys shall be expended under the direction of the city council. But no such tax shall be levied, or money borrowed, except in accordance with the provisions of section 44 of the city charter, and in all cases when questions under this section are submitted to qualified voters, the amount and object of the proposed tax or loan shall be specifically stated, to be voted upon." * * (Chap. 110, Private Laws, 1853, p. 304.)

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Here, it will be seen, is an unlimited grant of power to the common council of the city to levy and collect special taxes, or borrow money on the credit of the city, for any purpose whatever which may be considered essential to promote the common interest of the city. The common council have authority to contract debts to any amount, impose taxes for any and all conceivable objects and purposes; embark the finances and credit of the city in any enterprise which, in the judgment of the common council, will contribute to the wealth, prosperity or trade of the city, or promote the social and material condition of its citizens. There is no limitation, no restriction imposed by the legislature upon the power of the corporation to run in debt or burthen the people with taxes. If the common council deem it expedient, and a majority of the voters of the city will sanction the policy, the city, in its corporate capacity, may carry on works of internal improvement, at home or abroad, so that those works are calculated to stimulate the trade and increase the business of the city. No matter how ruinous and oppressive these special taxes might be to the owners of real estate, or to the minority of the tax payers, yet we do not see why, under this section of the charter, the common council and a majority of the qualified voters, might not compel the city to become a stockholder in a line of steamboats, to run up and down the lakes for transportation of freight and passengers; subscribe for stock in railroads; improve harbors; open roads and build bridges within or without the city limits; erect and operate flouring mills; keep hotels; or in short,

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embark in any mercantile, manufacturing or commercial enterprise, which, in the language of the charter, "may be considered essential to promote or secure the common interest of the city," and pledge the resources and credit of the city for the repayment of all sums borrowed for these purposes, and impose taxes to meet the same. Now the question arises, can the legislature confer upon a municipal corporation such unlimited power of taxation, such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city? If it had merely organized the city government, without imposing any restraint upon the power of taxation and of raising money, then the corporation could only have imposed taxes and raised money for legitimate municipal purposes. The power of the corporation over these matters would have been limited by the object and law of its creation. A municipal corporation is organized for political and governmental purposes, and is invested with such powers as are necessary or incidental to the purposes of local government. The right of taxation can be exercised by the municipal corporation only to raise money to meet the expenses incident to the city government, and the exercise of its political powers; for as to such objects only does the necessity of taxation exist, and not to enable the city to embark in any enterprise or business which may be deemed profitable or advantageous to the people at large. In this state the constitution imposes upon the legislature the duty, when providing for the organization of cities and incorporated villages, to restrict their power of taxation, of borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts, by such municipal corporations. This provision of the constitution would be a dead letter, entirely inoperative and of no effect, if section 8, amending the city charter, can stand. For, as already observed, that provision of the charter confers upon the city council the most unlimited power to levy taxes and run in debt. It does not confine the common council to municipal purposes when exercising the right of taxation. They had this power by the original charter. That gave the authority to levy all the taxes, and raise all

the money, necessary to carry on and support the government. But this amendment was intended to confer a right of taxation beyond that given in the charter, and for other than municipal purposes. It is a power to impose special taxes to any amount, and for any purpose whatever, which may be considered essential to promote or secure the common interest of the city. I do not think the legislature could confer upon any municipal corporation such unlimited, such absolute power of taxation. More especially is the legislature restrained from conferring such power under a constitution which imposes upon it the duty, in organizing cities and villages, *to restrict their power of taxation*, borrowing money, and contracting debts. It is very clear that this provision of the constitution does not contain a grant of power to the legislature to organize cities, but is a restraint upon that power. The legislature possessed the power to incorporate cities. This was incident to its general legislative power. This provision was undoubtedly placed in the constitution by its framers with full knowledge that the legislature then possessed, and would continue to possess and exercise, the power of authorizing municipal corporations to levy taxes and borrow money, and it was intended that the legislature should not give this authority without restricting it so as to prevent abuse and oppression. This evidently was the object and design of the constitutional provision. Now can the legislature disregard it entirely? Can it confer upon a municipal corporation the right to impose taxes to any amount, and for any purpose? We think not. And therefore, when the legislature attempts to confer upon a municipal corporation an unrestricted power to levy taxes and raise money, aside from and above what may be necessary and proper to support the local government, and for legitimate municipal purposes, such unlimited grant of power must be held to be void. Otherwise, no force or effect is given to the provision of the constitution cited.

Nor do we consider it a sufficient answer to this objection, to say that the legislature properly restricted the power of the corporation to levy taxes and contract debts, when they provided that no tax should be levied, or money borrowed,

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under sec. 8, unless a majority of the voters should be in favor of levying the tax or making the loan. For in the latter case the restriction would be one imposed rather by the people than the legislature. Besides, if a majority of the qualified electors were in favor of the tax, then the common council would have the power to impose it without limit. Thus the minority would be oppressed, and at the mercy of a bare majority of the electors. And one of the great advantages and blessings of a written constitution, above all others, is that the minority can invoke its protection against the demands and oppression of a violent majority. It may be said that, according to the structure of our society and government, the people are regarded as the safest depository of political power, and that to make the authority of levying taxes and running in debt, depend upon the votes of a majority of the qualified electors of the corporation, would be the very best check which the legislature could devise to prevent abuse in the exercise of this power. But such is not the theory of the constitution. The powers of our government are divided into three departments, and agents are chosen by the people to exercise and put in action these several powers of the government. The law-making power is vested in the legislature. That is the department of the government to organize cities and incorporate villages. The constitution gives the legislature that power, and does not leave it with the people. And it contemplates, when the legislature does organize a city, and confers upon the local authorities powers of taxation, and of raising money, that it should do so with proper restrictions and limitations, so as to prevent abuse, and protect the minority of the electors from the oppression and tyranny of the majority. The legislature cannot divest itself of this duty and transfer it to the people.

To prevent all misapprehension, however, we will say that we do not suppose an act of the legislature creating a municipal corporation, but imposing no restriction upon the power of such corporation to levy taxes and borrow money, would necessarily be void for that reason. In such a case, the city authorities would only have power to levy taxes and

raise money to support the local government, and for proper municipal purposes. And although the wants of municipal corporations are great, still they are not unlimited. The corporation could undoubtedly raise all the revenue sufficient for strictly municipal expenditures, but could not raise any and all moneys for every purpose which might promote the common interest of the city. No one can doubt but that the dredging out of the St. Clair Flats, or excavating the Rapids of the Mississippi river, would most essentially promote the common interest of all towns and cities along the lakes and that river; still, imposing taxes for the purpose of accomplishing these works, could hardly be said to be raising money for municipal purposes in any of them. It may be difficult to define, in advance, what is strictly embraced in the words "municipal purposes." There is no kind of doubt, however, that there are many things, and many branches of business, which promote in an essential degree the interest of towns and cities, and yet which the municipal corporation has no right to carry on.

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FOSTER
v.
THE CITY OF
KENOSHA.

We have endeavored to show that the unlimited grant of power of taxation and contracting debts, attempted to be conferred upon the common council by section 8 of the act amending the charter of the city of Kenosha, was in conflict with section 3, article 11, of the constitution, and must fall. As a necessary result, the act of the common council, under that section, in creating the debt for the payment of which the tax mentioned in the complaint was levied, cannot be sustained. Whether this would render the scrip of the city, issued in pursuance of that action of the common council, void, or not, we will not attempt to determine in this proceeding. It is sufficient here to state that we consider the tax mentioned in the complaint unauthorized, and that, within the decisions of this court in the cases of *Walker vs. Carpenter* (unreported), and *Dean vs. The City of Madison*, 9 Wis., 402, the respondent has the right to restrain the city authorities from collecting the same.

The order of the circuit court, refusing to dissolve the injunction herein granted, is affirmed.

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CENTRAL BANK
OF WISCONSIN
v.
KNOWLTON et al

THE CENTRAL BANK OF WISCONSIN vs. KNOWLTON and another.

The complaint in a suit brought in a corporate name, need not aver the plaintiff to be a corporation.

APPEAL from the Circuit Court for *Rock* County.

The *Central Bank of Wisconsin* sued *Knowlton* and another, as successive indorsers of a bill of exchange. The complaint did not aver that the plaintiff was a body corporate. Demurrer to the complaint, on the ground that it did not appear on the face of it that the plaintiff had a legal capacity to sue. The circuit court overruled the demurrer, and the defendants appealed.

Prichard & Jackson, for appellants, contended that inasmuch as, under our statute, it is not necessary for a domestic corporation to prove its existence, on the trial, unless the defendant in his answer shall have denied it, the fact must be affirmed in the complaint, so as to become the subject of *denial*.

Conger & Hawes, for respondent, cited 1 John. Cases, 133; 14 John., 239; *Goodrich vs. Com. School Dis.*, 2 Wis., 102; *Bank of Genesee vs. The Patchin Bank*, 3 Kernan, 309; 13 Howard, 270; 17 id., 487; 18 id., 308; *Farmers & M. Bank vs. Sawyer*, 7 Wis., 379; 1 Duer, 707; 20 N. Y., 355; 8 Howard, 326.

November 19. *By the Court*, COLE, J. In the case of the *Farmers & Millers' Bank vs. Sawyer*, 7 Wis. R., 379, this court expressed the opinion that where a suit was brought by a corporation, it was not necessary to allege that the plaintiff was a body corporate, created by or under the laws of this or any other state, and had capacity to sue, and that a demurrer to a complaint upon that ground would be bad. It is true that the precise question before the court in that case was whether the demurrer was frivolous, and we held that it was not. But still we supposed that a demurrer to a complaint on the ground that it did not aver that the plaintiff was a corpora-

tion, was not well taken. The following cases adjudge that precise point, as we understand them: *Harris vs. The Muskingum Man. Co.*, 4 Blackf., 267; *Richardson vs. The St. Joseph Iron Co.*, 5 id., 146; *The Bennington Iron Co. vs. Ruth-erford*, 3 Harrison R. (N. J.), 105; *Same case*, p. 158; *The Union Mutual Ins. Co. vs. Osgood et al.*, 1 Duer, 707; *Zion Church vs. St. Peter's Church*, 5 W. & S., 215; *The Bank of Louisville vs. Edwards*, 11 How. Pr. R., 216; *The Holyoke Bank vs. Haskins*, 4 Sandf., S. C. R., 675; *Rees vs. Conococheague Bank*, 5 Rand. R., 326; *Bank U. S. vs. Haskins*, 1 John. Cases, 132.

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CENTRAL BANK
OF WISCONSIN
v.
KNOWLTON & al

The following authorities hold that where a corporation sues, the declaration need not set forth by averment how it was incorporated, but upon the general issue pleaded it must be proved that it is a corporation: *The President, Directors and Company of the Bank of Auburn vs. Weed et al.*, 19 John., 299; *The President and Directors of the Bank of Utica vs. Smalley et al.*, 2 Cow., 770. But this rule has been changed by sec. 3, chap. 148, R. S., 1858 (so far as domestic corporations are concerned), which declares that, "in actions by or against any corporation created by or under any statute of this state, it shall not be necessary to prove, on the trial, the existence of such corporation, unless the defendant, in his answer, shall have denied that the plaintiff is a corporation, and annexed thereto an affidavit of the truth of such answer." The counsel for the appellants contends that by implication, at least, this section requires that the complaint should aver that the plaintiff is a corporation, since it speaks of the defendant's denying the existence of the corporation in his answer. He thinks it involves a gross solecism to say that a party shall deny what has not been affirmed. But we think this is refining too much upon the language of the statute. It is very easy for a party to determine from a complaint whether the action is brought by a corporation or a natural person. If the suit is by the former, and the defendant wishes to litigate the question as to whether there is such a corporation or not, he can easily allege in his answer that no such corporation exists, verifying the answer by an affidavit, and then the burden will be thrown upon the plaintiff

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PRICE
v.
DIETRICH.

of proving its charter or act of incorporation. This provision was undoubtedly enacted to relieve the plaintiff from the expense and inconvenience of proving its charter, in every case of an action by a domestic corporation, where the general issue was pleaded. They have the same statute in New York, and the courts of that state have given it this construction. *The Bank of Genesee vs. Patchin Bank*, 3 Kernan, 309; *The Waterville Manufacturing Co. vs. Bryan et al.*, 14 Barb. S. C. R., 182.

It follows from these views that the order of the circuit court, overruling the demurrer to the complaint, must be affirmed.

PRICE VS. DIETRICH.

19	626
96	196
12	626
106	896

The remedy provided by chapter 101 of the Revised Statutes of 1858, for creditors having claims against the estates of deceased persons, is exclusive in its character.

No suit can be maintained upon a claim which has been allowed by the county judge, or by the commissioners appointed by him to receive, examine and adjust claims against the estate of the deceased, in accordance with the provisions of the statute, unless, after an order of distribution has been made by the county judge, the administrator refuses or neglects to pay according to the order, in which case he becomes personally liable.

The allowance of a claim by the county judge, or by said commissioners, has the force and effect of a judgment.

ERROR to the Circuit Court for *Dane* County.

The case is stated in the opinion of the court.

R. W. Lansing and *E. T. Sprague*, for plaintiff in error.

Nat. Rollins, for defendant in error.

November 19. *By the Court*, PAINE, J. This action was brought against the plaintiff in error as administratrix of the estate of Robert Price, deceased. The complaint averred that the deceased was indebted to the plaintiff in the sum of \$611 11; that the defendant was appointed his administratrix; that the plaintiff's claim had been duly presented to the county judge and allowed, but that the defendant had neglected and

refused to pay it. To this complaint a demurrer was interposed, which was overruled by the court below.

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The question presented is whether, upon the facts averred, the action is sustainable against the administratrix. We think it is not. The statute provides a specific method for ascertaining and settling claims against the estates of deceased persons. Commissioners are appointed, or the county judge acts in their place, and due notice is given of the time and place when and where claims may be presented for allowance. When allowed, they have all the force and effect of a judgment. Either party may appeal, but if neither does appeal, the adjudication of the county judge or commissioners is conclusive.

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v.
DISTRICT.

This being so, no beneficial purpose could be subserved by allowing an action on the claim thus allowed, against the administratrix. If judgment should be recovered against her, the party recovering it would be in no better position than he was before. The law therefore provides that the county court may, from time to time, order a distribution of assets, and payment of debts. Sec. 40, chap. 101, R. S., 1858. The clear implication from all these provisions of the statute, even in the absence of a positive provision to that effect, would be that the remedy which they furnish is exclusive in its character. But in addition to that, sec. 62 expressly provides that, except as that chapter allows, no action shall be sustained against an executor or administrator. Sec. 44 provides that after an order of distribution has been made by the county court, then if the administrator does not pay according to the order, he shall be personally liable. But the only result of allowing an action upon a claim already allowed by the commissioners or judge, would be to accumulate costs against the estate, without advancing the remedy in any degree. The party would still be obliged to obtain his order for distribution from the county court, and to that he may and ought to resort in the first instance.

The judgment must be reversed, with costs, and the cause remanded for further proceedings.

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1860.

LOCKWOOD VS. STEWART and others.

LOCKWOOD
v.
STEWART et al.

A judgment will not be reversed, on account of the refusal of the court below to grant a new trial, if there was evidence enough to support the verdict, although it may appear to this court that the preponderance of the proof was against it.

APPEAL from the Circuit Court for *Milwaukee* County.

This was an action to recover damages for a breach of warranty as to the quality and condition of a carpet purchased by the plaintiff of the defendants. Verdict for the plaintiff. Motion for a new trial, on the ground that the verdict was contrary to the weight of evidence, overruled, the defendants excepting, and judgment upon the verdict.

J. Ladue, for appellants.

Waldo, Ody & Van, for respondent.

November 19. *By the Court*, COLE, J. The point in controversy in this case was, whether the carpet mentioned in the pleadings was imperfect and injured at the time of the delivery thereof to the respondent, and was not free from damage or defects of every kind, as the appellants represented and warranted the carpet should be, when it was purchased, and what damages the respondent had sustained in consequence. The nature of the defects in the carpet, and the manner in which they were covered up, certainly authorized the jury in finding that those defects and injuries must have existed in the carpet before it came to the possession of the respondent, and they so declared by their verdict. The questions submitted to the jury were matters of fact, and it was the province of the jury to weigh and determine the effect of the testimony. It is unnecessary for us to declare what conclusions we should have drawn from the evidence, and it is sufficient to say that it clearly supports the verdict, even if we concede that the weight of the evidence was against the finding. The only exception taken was to the ruling of the circuit court, denying the application for a new trial, and we are unable to say that the motion for a new trial was not properly denied.

The judgment of the circuit court is affirmed, with costs.

STACY and another vs. THE DANE COUNTY BANK.

June Term,
1860.STACY et al.
v.
DANE COUNTY
BANK.12 690
75 343

A bank in *Madison* received by mail, for collection, a note made and indorsed by persons living at *Stoughton*, a place about twenty miles from *Madison*, but with which there was a daily communication by railroad. There was no bank at *Stoughton*, and, before the note fell due, the bank at *Madison* delivered it for collection to an express company, which had an office in *Stoughton*, and was in the practice of collecting such paper, and was responsible, and reputed to be a prompt and capable collecting agent. The express company delivered the note, in due time, to a notary public residing in *Stoughton*, for presentation, and protest if not paid, but the notary made his demand of payment one day before the note fell due, and on the same day deposited notice of non-payment, for the indorser, in the post-office at *Stoughton*, although the indorser, who was then absent from home, had his place of residence in said village, whereby, the makers being insolvent, the debt was lost. *Held*, that the contract implied from the receipt by a bank of a note for collection, payable at a distance from its place of business, is not absolutely to make due presentment of the note and give due notice of its non-payment, but to place it in the hands of some competent and responsible agent for that purpose, and that if the bank exercises reasonable care and skill in selecting such agent, it is not liable for his default.

Held, also, that a person charged with the collection of commercial paper, may, in the absence of any direct notice to the contrary, assume that a notary, appointed by public authority, is a fit and proper agent to discharge the duties of his office, and that if the express company were to be regarded in this case solely as the agent of the bank, the duty of the latter was performed when the note was placed in the hands of a notary, at *Stoughton*, in due time to make proper presentment and protest.

APPEAL from the Circuit Court for *Dane County*.

Stacy and *Thomas* sued the *Dane County Bank* upon an alleged undertaking duly to present for payment a note sent by them to said bank for collection, and, if not paid, to take the proper steps to charge the indorser; *breach*, that the note was not duly presented for payment by said bank, nor the indorser duly notified of its non-payment, by means of which the indorser was discharged, and, the makers of the note being insolvent, the debt was lost.

Trial by the court. The evidence was as follows: On the 14th of May, 1858, the plaintiffs, who resided at *Chicago*, sent by mail to the defendant, at *Madison*, for collection, a note of *Mosher, Rayner & Co.*, for \$380, due 1-4 of June, 1858, indorsed by one *Gregory*, and a note of said *Gregory* for \$44 22, due 3-6 of June, with instructions to remit in draft on *New York*, less exchange. The defendant received the notes in due course of mail, and wrote in reply that they

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v.
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BANK.

should "receive due attention." Mosher, Rayner & Co. and Gregory, resided, (as the plaintiffs knew), at Stoughton, about twenty miles from Madison, the place of business of the Dane County Bank. Stoughton was connected with Madison by railroad, and persons could go from Madison to that place and return the same day. There was no bank at Stoughton, and on the 19th of May, the defendant delivered the two notes to the American Express Company for collection. The express company collected the note of said Gregory and delivered the note of Mosher, Rayner & Co., before its maturity, to one Allen, a notary public residing at Stoughton, for presentation, and for protest if not paid. Said notary presented the note for payment on the *third* day of June, and on the same day deposited in the post office at Stoughton, notice of its non-payment, addressed to Gregory, who was then absent from home, but had his place of residence in that village. It was admitted that the makers of the note were, at the maturity thereof, and ever since have been, insolvent. It was in proof that the *Dane County Bank* was in the practice of receiving notes for collection, it being a part of its business to collect notes and remit proceeds in exchange at current rates, and where notes were payable out of Madison, it charged in addition, 1-4 of one per cent. for doing the business. This commission on the amount collected from Gregory, the bank retained, and remitted the residue to the plaintiffs, after deducting \$2 25, charged by the express company for its services and cost of protest of the note of Mosher, Rayner & Co. It was in proof also, that it was part of the business of said express company to collect notes; that it had an office at Stoughton; that it had the reputation of being a prompt, reliable and capable collecting agent, and that it was responsible. As to the usage of the defendant and other banks in Madison, in reference to the collection of notes payable at points distant from that city and upon railroads, the cashier of the defendant testified, that it was the custom of said banks, when they had paper for collection which matured at a place where there was no bank, to send it for collection by the American Express Company, if it had an office at such place. The

cashier of the State Bank at Madison, testified, to the same usage, as to the collection of paper through the express company; but, on cross-examination, he said that it was a rare thing for the banks in Madison to send collections by the express company, as they had but little paper payable where there was no bank, but that when there was no bank at the place where the note was payable, there was no way but to send it by the express company, or decline to receive it for collection. It was also in proof that the plaintiffs had never before transacted any business with the defendant. The plaintiffs objected to the admission of the evidence as to its being a part of the business of the express company to collect notes, and as to its reputation and responsibility, and as to the usage of banks in Madison, in employing said company as a collecting agent, but the court overruled the objection, and the plaintiffs excepted.

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1860.

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v.
DANE COUNTY
BANK.

The finding of the circuit court as to the facts, was, among other things, that the defendant was not guilty of any negligence in the premises, but had discharged fully and properly the duty it owed to the plaintiff on account of the receipt of said note by it, for collection. The finding was excepted to. Judgment for defendant.

Geo. B. Ely and *E. E. Boies*, for the appellants, contended that the contract of the defendant to "give due attention" to the collection of the papers sent to it by the plaintiffs, was founded on a valuable consideration, and, as to its liability in this case, cited *Allen vs. Merchants' Bank*, 22 Wend., 215; *Downer vs. Mad. Co. Bank*, 6 Hill, 648; *Mont. Co. Bank vs. Albany Bank*, 8 Barb. S. C., 396; *McKinster vs. Bank of Utica*, 9 Wend., 46, and 11 id., 473; *Tyson vs. State Bank*, 6 Blackf., 225; *Van Wart vs. Woolley*, 3 Barn. & Cress., 439; *Thompson vs. Bank*, Riley's Cases, 81; *Warren Bank vs. Suffolk Bank*, 10 Cush., 582. They distinguished from these cases, *Fabens vs. Merchants' Bank*, 23 Pick., 330; *Tiernan vs. Com. Bank*, 7 How. (Miss.), 648; and 7 Smedes & Marsh., 592, where the bank was acting as a mandatary without reward, and also *Bank vs. Triplett*, 1 Peters, 25, where the note was left for transmission. In the cases on which the defendant relies, the notes were payable at a distant point,

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BANK.

and were transmitted by the receiving bank to a bank at the place where the paper matured. Conceding that if a notarial demand and protest had been indispensable to charge the indorser, then the defendant would not have been responsible for the non-feasance of the notary, if due diligence was used to select a proper officer, they contended that in this case no protest was necessary, and the choice of the notary was a mere matter of convenience (*Sumner & Kimball vs. Bowen*, 2 Wis., 524; Rev. Stat., chap. 12, sec. 4; *Allen vs. Merchants' Bank*, 22 Wend., 215; *Thompson vs. Bank of the State*, 3 Hill (S. C.), 77; same case, *Riley's Cases*, 81); and that the presentation of the note before its maturity in this case, was proof of his incapacity, and of negligence on the part of the bank in selecting him as its agent.

Abbott, Gregory & Pinney, for respondent:

The undertaking of the bank was not that if the note were not paid, the indorser should be charged *at all events*, but simply that the bank would exercise due diligence to accomplish that result. If, then, the bank pursued, in this case, the customary course of business in respect to such matters, it is exonerated. Ang. & Ames on Corp., 250; Paley on Agency, 9. The note being payable in a distant place, it is to be presumed that it was intended by the parties that it was to be transmitted to, and collected by a sub-agent, and if the bank, in good faith, employed suitable sub-agents for collection, it is not liable for their default. Ang. & Ames, *supra*; 2 Hill on Torts, 481-2; *Fabens vs. Mercantile Bank*, 23 Pick., 330; *Dorchester Bank vs. N. E. Bank*, 1 Cush., 177; *Warren Bank vs. Suffolk Bank*, 10 Cush., 582; *East Haddam Bank vs. Scovil*, 12 Conn., 303; *Bellemire vs. Bank of U. S.*, 4 Whart., 105; *Mechanics' Bank vs. Earp*, 4 Rawle, 384; *Tiernan vs. Commercial Bank*, 7 How., 648; *Agricultural Bank vs. Commercial Bank*, 7 Smedes & Marsh., 592; *Jackson vs. Union Bank*, 6 H. & J., 150; *Citizens' Bank vs. Howell*, 8 Md., 530; *Baldwin vs. Bank of Louisiana*, 1 Lou. Ann. R., 13; *Frazier vs. Gas Light and Banking Co.*, 2 Rob., 294; *Bank of Washington vs. Triplett*, 1 Peters, 25; *Parsons on Merc. Law*, 144. The cases opposed to this doctrine, are chiefly found in the New York reports, and are based whol-

ly upon the decision of the court of errors in *Allen vs. Merchants' Exchange Bank*, 22 Wend, 215, which (counsel insisted) is at variance with the law, as settled in other states.

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2. An agent is not ordinarily responsible for the negligence or misconduct of a sub-agent, where the employment of the latter is authorized by the principal, either expressly or impliedly, or by the usage of trade, if he has used reasonable diligence in his choice, as to the skill and ability of the sub-agent. Story on Agency, 201-2. And if there is a known usage of trade, or mode of transacting business applicable to the particular agency, it will be the duty of the agent to conform to it. The usual mode of protesting paper, is to place it in the hands of a notary, as the express company did in this case, and if the appellants had been attending to the matter in person, they would doubtless have pursued that course. "Notaries are officers appointed by the state; confidence is placed in them by the government. This may be evidence sufficient to justify an agent in committing business to them relating to their office, although in point of fact it may subsequently appear that they did not possess the necessary qualifications." *Smedes vs. Utica Bank*, 20 John., 383.

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v.
DANE COUNTY
BANK.

By the Court, PAINE, J. The respondent received from the appellants, for collection, a note against parties residing in Stoughton, about twenty miles distant from Madison, where the bank is located. It was placed by the bank, in due time, in the hands of the American Express Company, a part of whose business was to collect commercial paper, and was taken by it to Stoughton, and delivered to a notary public, who presented and protested it on the second day of grace, whereby the indorser was discharged, and the debt lost. This suit is now brought against the bank to recover its amount.

The theory of the plaintiffs is, that the bank, having received the note for collection, was bound to make due presentment, and give due notice to the indorser, and that it was responsible for the negligence or incapacity of any sub-agents whom it employed for this purpose. The bank, on

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BANK.

the other hand, contends that the contract implied by the reception of the note against a party residing at a distance from its place of business, was not absolutely to make due presentment and give due notice, but to place the note in the hands of some competent and responsible agent, doing business at the residence of the maker, and that having done this, it is itself discharged from liability. This view was sustained by the court below, and we think is sustained by the authorities. *Fabens vs. Mercantile Bank*, 23 Pick., 330; *Dorchester Bank vs. N. E. Bank*, 1 Cush., 77; *Warren vs. Suffolk Bank*, 10 id., 582; *East Haddam Bank vs. Scovil*, 12 Conn., 303; *Agricultural Bank vs. Commercial Bank*, 7 S. & M., 592; *Citizens' Bank vs. Howell and others*, 8 Md., 530; *Hyde vs. Planters' Bank*, 17 La., 560; 2 Rob. (La.), 294; *Bellemire vs. Bank of U. S.*, 4 Whart., 105. These cases, and others which might be cited, fully establish the rule, that, upon facts like those here presented, there is an implied authority to employ a sub-agent, and that if the bank exercises reasonable care and skill in selecting one, it is not afterwards liable for his default.

A different rule has prevailed in New York; though it was there first decided by the supreme court in accordance with the rule as above stated. 15 Wend., 482. That decision was, however, overruled by the court of errors, 22 Wend., 215, which has been subsequently followed in that state. It is placed, however, expressly on the ground of the authority of that case, which is impliedly admitted to be in conflict with the commercial rule, as settled in other states. See *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 463. And the reasoning of the New York courts has not induced the courts of other states to change their decisions. See case cited from 1 Cushing.

The testimony in the case showed that there was no bank at Stoughton; that the express company did business and had an office there; and that it was responsible, and was a prompt and reliable collecting agent. We think, upon these facts, the bank discharged its duty by placing the note in the hands of the express company.

The authorities cited also sustain the position that it would

be a good defense, to show that the note was in due season delivered to a notary public at the residence of the maker, for presentment and protest. This is placed upon the ground that those officers are appointed by public authority, and that therefore, at least in the absence of any direct notice to the contrary, parties have a right to assume that they are fit and proper agents to discharge the duties of their office. So that if the express company were to be regarded solely as the agent of the bank to transmit the paper, the bank would still show a good defense, by proving that the note was placed in the hands of a notary at Stoughton, in due time to make proper presentment and protest.

These conclusions dispose of the exceptions taken.

The judgment is affirmed, with costs.

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1860.

WALSH
v.
DART et al.

WALSH vs. DART, impleaded with PHOEBE BLATCHLEY.

The courts of this state will not take judicial notice of the laws of other states, but in the absence of any proof to the contrary, will presume them to be in accordance with our own.

By the law of this state, bills payable at sight are entitled to three days of grace, and in a suit in a court of this state against the indorser of such a bill, payable in the state of New York, the court must presume, unless there is proof to the contrary, that the bill was entitled to days of grace by the law of that state, and hold that a protest of such bill for non-payment on the day it was first presented to the drawees, was premature and insufficient to charge the indorser.

APPEAL from the Circuit Court for *Marquette* County.

This was an action of assumpsit, (brought before the adoption of the Code), by an indorsee against the indorsers of a bill of exchange. The declaration contained the common money counts, with a copy of the bill sued upon, which was as follows:

"San Francisco, Oct. 6, 1854.

At sight of this second of exchange (first and third unpaid), pay to the order of Phoebe Blatchley two hundred and fifty dollars, value received, &c.

ADAMS & Co.

To Messrs. Adams & Co., New York."

12	685
78	311
12	685
82	351
12	685
110	128
12	635
61	LRA 196n

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WALKER
v.
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Plea, the general issue. Trial by the court. The facts found by the judge were, that the first bill of the set was indorsed by the defendant *Dart*, to the plaintiff, on the 12th of January, 1855; that the plaintiff, on the 26th of that month, sent it by mail to his correspondent in New York, for presentment to the drawees; that, by some delay in the mail, the bill did not reach New York until the 9th of April following; that about the last of March, the plaintiff, fearing the bill was lost, procured the defendants to indorse and deliver to him the *second* of the set (which indorsement was made on Sunday); that the second of the set was presented for payment to the drawees on the 3d of April following, and payment being refused, was on that day protested for non-payment, and due notice thereof given to the indorsers; that the defendant *Phabe*, at the time of indorsing said bill, was a married woman; and that the first of the set was never presented for payment. His conclusions of law were, that all the bills passed by the the indorsement of the first of the set; that the plaintiff was not guilty of any *laches* in the forwarding or presentment of that bill; that the presentment of the second of the set to the drawees for payment, the protest of it for non-payment and due notice thereof to the indorsers, fixed the liability of the indorsers; that the defendant *Phabe* was not liable to a personal action on her indorsement, and that the plaintiff was entitled to judgment against the defendant *Dart*, for the amount of the bill, with interest from the date of protest, and costs.

At the time the plaintiff offered in evidence the second of the set of bills, and the certificate of its protest, the defendants objected to their admission, on the ground that said bill had not been presented for acceptance nor protested for non-acceptance, and that no notice of its non-acceptance had been given to the defendants, and also on the ground that the demand of payment was not made at the proper time, to wit, on the third day after presentment, which objections were overruled, and the defendants excepted. The first of the set of bills appears to have been produced at the trial. Judgment against *Dart*, from which he appealed.

Wheeler & Kimball, for appellant:

1. Bills of exchange payable at sight are entitled to days of grace by the law merchant, and must be presented for acceptance to fix the time when payment may be demanded. Story on Bills, p. 270, § 228; 2 Greenl. Ev., § 186; Chit. on Bills, 377; Edwards on Bills, pp. 386, 387. There was no statute in New York at the time this bill was presented for payment, changing the common law rule. No demand of payment can be made, nor notice of non-payment given, so as to fix the liability of the indorser on such a bill, till the third day after presentment. The drawees were not obliged to pay this bill when presented. It might have been paid, if payment had been demanded on the third day of grace. Hence the indorser is discharged. Story on Bills, *supra*; *Hart vs. Smith*, 15 Ala., 807. 2. The plaintiff, by keeping the bill fourteen days before mailing it to New York or putting it in circulation, is guilty of such *laches* as to discharge the indorser, there being no proof of any excuse for the delay. *Mohawk Bank vs. Broderick*, 13 Wend., 135; *Gough et al. vs. Staats*, 13 id., 549; *Smith vs. Janes*, 20 id., 192; *Harker vs. Anderson*, 21 id., 372.

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Hopkins & Johnson, for respondent, contended that bills drawn at sight are not entitled to days of grace according to the commercial law of New York, but are payable on presentment, and if not then paid, should be protested for non-payment, citing *Martin vs. Trask*, 1 E. D. Smith, N. Y., 505. A protest of non-payment need not certify non-acceptance of the bill, 4 Dall., 193; 3 id., 368-424. As to delay in not presenting the bill, the court below found that the plaintiff was not guilty of *laches*, and no motion for a new trial was made.

By the Court, COLE, J. The only question in this case is, whether days of grace are allowable in New York upon a bill of exchange payable at sight. The action is by an indorsee against an indorser of such a bill, and it is claimed that the latter is discharged on account of the neglect to present the bill for payment at the proper time, and give notice of non-payment, so as to fix the liability of the indorser. The drawees lived in New York, and of course the law of

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that state would govern as to the proper time to present a sight bill for payment. It is contended by the counsel for the respondent that by the law of New York, a bill of exchange payable at sight was due on presentment. And we have been referred to an exceedingly able and well-reasoned decision (*Trask vs. Martin*, 1 E. D. Smith, 505,) of the court of common pleas of New York city, where the question is distinctly decided, and it is held that days of grace are not allowable on bills payable at sight, in New York city. But the difficulty with the case at bar is that there was no attempt to prove upon the trial, what the law of New York is upon that subject. By the statute of this state, days of grace are allowed on bills of exchange payable at sight. Sec. 5, chap. 60, R. S., 1858. We must, therefore, in the absence of all proof to the contrary, presume that the law of New York is the same as in this state, and that grace is allowable upon bills payable at sight. For we have held that we will not take judicial notice of the laws of other states, but will presume them to be in accordance with our own until the contrary appears; and that whenever any difference is relied on, it is incumbent on the party relying on it, to prove that difference for the information of the court. *Rape vs. Heaton*, 9 Wis., 328; 2 Phillips on Ev., Cowen, Hill and Edwards' Ed., p. 427, and notes. Now if, by general principles of commercial law, days of grace are not allowed on sight bills in New York city, this fact should have been established by testimony on the trial. Otherwise, how can we assume that the law of that state is different from the law of this, upon the point under review? "In a late case in Louisiana," cited in note 1, p. 131, 8th edition Kent's Com., "the question arose, and it became necessary to determine whether sight bills are entitled to grace in New York. Upon a commission issued, several of the principal lawyers, brokers and notaries of New York, were examined, and the court decided, upon a vast preponderance of evidence, that they were not." *Nimick vs. Martin*. Some such practice should have been adopted in the present case, or some steps taken to show what the rule in New York was. As this was not done, we

cannot see but the judgment must be reversed, and a new trial awarded.

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In the absence of our statute upon the question, it is not entirely clear whether it would be held that in this state a bill of exchange drawn payable at sight was due on presentment, or on the third day thereafter. There is some conflict of authority, and the point does not seem to be entirely settled by them. But still our statute removes all doubt, and it is therefore unnecessary to inquire whether it is in affirmation of the general principles of commercial law or not.

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The judgment of the circuit court is reversed, and a new trial ordered.

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78	635
76	342
12	690
98	518
12	639
108	295

Where a promissory note is indorsed by the payee, and also by another party, the legal inference from the instrument itself, is that the payee is the first indorser.

Parol evidence is admissible to prove the circumstances attending the indorsement by such other party, which may give him the character of a prior indorser in respect to the payee.

A made and delivered to B his promissory note, payable to the order of B, and indorsed in blank by C; said note being given for goods sold and delivered by B to A upon the faith and credit of C's indorsement, which C then agreed to give for that purpose, and which he did give in pursuance of such agreement, with intent to become liable to B in the amount of the note. Demand at maturity, protest for non-payment, and notice to C, were duly made and given. Held, that by commercial usage C was liable, as a prior indorser, to B.

The proper mode of pleading in such a case, is to state in the complaint the facts which make the defendant liable in the character of a prior indorser.

ERROR to the Circuit Court for *Milwaukee* County.

This action was brought before a justice of the peace, and came to the circuit court by appeal. The complaint alleged that, on &c., one Swaney made his promissory note, whereby he promised to pay to the order of *Shepard*, [the plaintiff below,] at the Farmers and Millers' Bank, ninety days after date, \$34 48, with interest, &c.; that said Swaney, being at that time desirous to purchase of said *Shepard* goods, on credit, to the

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amount of \$34 48, agreed with *Shepard* to procure said note to be indorsed by *Cady*, [the defendant below,] for the further security of the plaintiff, and accordingly the plaintiff agreed with said Swaney to sell and deliver him said goods upon receiving from said Swaney such note, so indorsed, whereupon the defendant did, at the request of Swaney, indorse said note, with intent to give credit to said Swaney, and to make himself liable, with said Swaney, to the plaintiff for the price of said goods; that the plaintiff sold and delivered said goods to Swaney upon such agreement, and received from him the said note, so indorsed; that said note, when it became due, was duly presented for payment at said bank, and payment thereof refused, whereof the defendant had due notice; and that the plaintiff was the legal owner and holder of said note, &c.

The defendant answered: 1. By a general denial. 2. By an allegation that his name was not indorsed upon said note at the date thereof, nor at the time of the purchase and delivery of the goods mentioned in the complaint, nor till a long time thereafter; wherefore he says that the credit given by the plaintiff to said Swaney "was not by virtue of the name of the defendant being written on the back of said note, but that said credit was given without the knowledge of the defendant." 3. By an allegation "that the complaint does not state facts sufficient to constitute a cause of action against the defendant, for that its whole allegations seem to make the defendant responsible for the agreement and debt of another, without stating the consideration upon which said liability arose, and therefore the defendant says that he is not legally bound to pay said note, or any part thereof, and that he has not agreed to answer to the plaintiff for the debt of said Swaney," &c.

On the trial by the court, a jury being waived, the plaintiff offered in evidence "the promissory note and indorsement specified in the complaint, in connection with other oral evidence, whereupon the defendant objected to the admission of the same in evidence, for the reason that there is no cause of action stated in the complaint, to which said note and indorsement are applicable. The court overruled the

objection, and admitted said note and indorsement in evidence," the defendant excepting.

The finding of the circuit court is stated sufficiently in the opinion of this court.

The defendant moved an arrest of judgment, "for the reason that, upon the pleadings in the case, and upon the whole record thereof, the plaintiff was not entitled to a judgment in his favor;" but the court overruled the motion, the defendant excepting, and judgment was rendered for the plaintiff.

George W. Lakin, for plaintiff in error, contended that the name of a person not a party to a note, indorsed upon it, does not render him liable to the payee; that the payee is to be regarded as the first indorser, and the party whose name is so indorsed as a second indorser; that if it is alleged that he intended by such indorsement to be responsible to the payee for payment of the note by the maker, parol evidence of such an intent is not admissible, the statute requiring a written note or memorandum, expressing the consideration. *Heath vs. Van Cott*, 9 Wis., 518; *Taylor vs. Pratt*, 3 id., 674; *Brewster vs. Silence*, 4 Seld., 207; *Brown vs. Curtis*, 2 Coms., 225.

Smith & Solomon, for defendant in error, contended that in a case like this the indorser is liable to the payee, and cited 3 Mass., 274; 5 id., 358, 545; 6 id., 519; 7 id., 233; 9 id., 314; 11 id., 436; 4 Pick., 311, 385; 17 id., 244; 19 id., 260; 24 id., 64; 7 Cush., 111; 9 id., 104; 31 Me., 536; 36 id., 147, 265; 3 Met., 275; 5 id., 201; 8 id., 504; 7 Foster, 366; 11 N. H., 385; 6 Vt., 642; 9 id., 345; 12 id., 219; 15 id., 161; 16 id., 554; 17 id., 285; 20 id., 355; 4 Conn., 389; 6 id., 315; Kirby's R., 393; 4 Watts, 448; 11 Penn. St., 460; 1 Spencer (N. J.), 256; 6 Gill (Md.), 181; 7 Gratt. (Va.), 189; 10 Richardson's L. R. (S. C.), 17; 2 McMullan, 313; 3 Ala., 610; 1 Ia. Ann. R., 248; 9 Texas, 615; 14 id., 275; 2 Cal., 485, 605; 18 Mo., 74, 140; 20 id., 571; 1 Greene (Iowa), 331; 13 Ill., 632; 7 id., 459; 3 Scam., 437; 7 Blackf., 35; 6 Ind., 478; 9 Ohio, 139; 17 id., 42; 3 Ohio St., 415; 2 Mich., 555; and in New York, 12 John, 159, 160; 13 id., 175; 14 id., 349; 17 Wend., 214, 215, 221; 1

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Most of the N. E. courts hold such an indorser liable as joint promisor; in some states he is treated as guarantor; and in others as an indorser. In New York he was formerly treated as a guarantor. The true rule probably is that established in the later N. Y. cases, found in the five authorities last above cited, where he is held to be liable to the payee, as indorser, on demand and notice.

November 19. *By the Court*, COLE, J. This action is upon a promissory note, made by one George Swaney, payable to the order of the defendant in error, and indorsed in blank by the plaintiff in error. It was proven on the trial, and the circuit court found as facts, that the note was executed by Swaney and indorsed by *Cady*, and afterwards delivered to *Shepard*; that the note was given for goods sold and delivered by *Shepard* to Swaney, upon the faith and credit of *Cady's* indorsement, which *Cady* then agreed to give for this purpose; that *Cady* executed the indorsement in pursuance of this agreement, with intent to become liable to *Shepard* in the amount of the note, and to give credit on the same; and that *Shepard* was the owner and holder of the note. It was also admitted upon the trial that due demand of payment of the note had been made at its maturity, and that it was duly protested for non-payment, and notice thereof properly given to *Cady*. The evidence in respect to the attending circumstances under which the indorsement was made, was objected to as being incompetent.

Now the legal inference from the face of the note mentioned in this case would be that *Cady* was second indorser. The note being payable to the order of *Shepard*, in the ordinary course of business he would be the first indorser; and unless he indorsed the note without recourse, he could not maintain an action upon it—if the note afterwards came to his hands—against the second indorser, because if he recovered, the second indorser would have an immediate right of action against him on his earlier indorsement. It would be, in effect,

the case of a prior indorser maintaining an action against a subsequent one. The note being payable to the order of *Shepard*, he must indorse it before it could come to the hands of *Cady* to be indorsed by him. This would be the legal intendment as to the chain of title, and the relative situation and rights of the parties. But notwithstanding this would seem to be the situation of the parties, and the natural construction of the contract from the face of the note, yet parol proof has been admitted to show what contract the parties intended to make, and then courts have resorted to one expedient and another to charge a party indorsing a note under such circumstances. Sometimes they have said he was to be charged as a maker, sometimes as a guarantor, and sometimes as an indorser. "Whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third party on the back of a note payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most cases it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story on Prom. Notes, sections 58, 59, and 479." *Rey et al. vs. Simpson*, 22 How. (U. S.), 349, '50. Under the decisions in this state, a party indorsing a note under those circumstances would undoubtedly be holden as an indorser, if at all. In *Hall vs. Newcomb*, 7 Ill, 416, Chancellor WALWORTH suggests the following method by which the indorsements on the note may be made to correspond to the intention of the parties when they made the contract, and consistency in the relations of the parties preserved. He says: "If the object of the second indorser is to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse it without recourse; and by such indorsement may either make it payable to the second indorser, or to the

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bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him and subsequent indorsement of the note to him by the second indorser." However necessary and proper this course might be to avoid any difficulty in framing a declaration under the old practice, I can hardly think it would be proper under the Code, which requires a party to state in his complaint the facts constituting the cause of action. It seems to me that the complaint was properly framed in the present case, and that we must hold that by commercial usage, a party indorsing a note under the circumstances therein stated, is bound as an indorser. This is the most rational ground upon which to place the party's liability, and is most in harmony with the contract actually made by the parties. And whether parol testimony should be admitted to explain the facts and circumstances under which the indorsement was made, does not seem to me now to be an open question. The authorities are too decided in favor of the admission of such testimony to be disregarded. See authorities cited on briefs in *Rey et al. vs. Simpson, supra*; *Moore vs. Cross*, 19 N. Y., 227.

The judgment in this case must be affirmed.

DODGE VS. SILVERTHORN, impleaded with others.

The owner of a school land certificate has an interest in the land described therein, which may be mortgaged.

A subsequent purchaser of the certificate with notice of such mortgage, takes the land subject thereto; and the record of such mortgage in the register's office of the county in which the land lies, is a sufficient notice.

If such purchaser of the certificate has paid the state the amount due thereon, he will be regarded, in a suit against him for the foreclosure of such mortgage, as having a prior lien upon said land for the amount so paid.

Where a woman mortgaged her land, to secure the payment of her note, an answer by a subsequent purchaser of the land, in a suit to foreclose such mortgage, alleging that the mortgagor, at the time of the execution of said mortgage and note, was a married woman living with her husband, is bad, on demurrer, although the complaint does not show the nature of the indebtedness which the mortgage was given to secure.

APPEAL from the Circuit Court for *Jefferson* County.

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The complaint in this action alleged that, on the 23d of December, 1856, the defendant *Almira Vanhoosen*, for the purpose of securing the payment of \$316, with interest, according to the tenor of her three notes of that date, executed to one Francisco a mortgage upon forty acres of land in Jefferson county, which was duly recorded July 18, 1857; that she was the owner of said land by virtue of a certificate of sale issued by the commissioners of school and university lands, on which there was due to the state in 1860 the sum of \$189; that she had made improvements on said land, which rendered it worth about \$1,000; that said notes and mortgage were assigned to the plaintiff on the 18th of July, 1857, on which day the assignment of the mortgage was duly recorded, and that there had been no proceedings had for the recovery of said debt. The complaint also alleged that after the assignment of said mortgage to the plaintiff, said *Almira* assigned and delivered said certificate to the defendant *Powers*, and gave him possession of said land, with the express agreement that he should pay said notes as part of the purchase money; that about the 2d of March, 1859, said *Powers* contrived with the defendant *Silverthorn*, that the latter should take an assignment of said certificate and procure a patent from the state in his own name; that said *Silverthorn*, with knowledge of the plaintiff's mortgage, took said assignment; that said certificate was presented to the school land commissioners, about the 2d of March, 1859, by said *Powers*, or by some one in his behalf, and a patent therefor issued to said *Silverthorn*; and that to secure the state for the amount then due on said certificates, said *Silverthorn* and wife, on the same day, executed to the state a mortgage on said land. The complaint also alleged, that no consideration was paid by *Silverthorn* for said assignment; that he paid nothing to the state at the time of taking said patent; that he had no interest in said land, but received and held the title thereof in trust for *Powers*; and that *Powers* continued to reside upon and enjoy the profits of said land. The complaint also alleged, that said *Almira* had left the state and was insolvent, and demanded judgment of foreclosure, &c.

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The defendant *Silverthorn*, by his answer, denied any knowledge of the plaintiff's mortgage upon said land at the time he bought the same and took the assignment of the certificate; and denied that he held said land in trust for said *Powers*; but alleged that he had bought the same of said *Powers* for its full value; and for a further defense, alleged that said *Almira* was, at the time of the executing said notes and mortgage, a married woman, living with her husband; wherefore he demanded judgment that said mortgage and notes be cancelled and declared null, &c.

To this answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a defense.

Judgment for the plaintiff on the demurrer.

Weymouth & Thorne, for appellant:

A school land certificate is merely an evidence of the right of the owner to purchase the land upon certain terms. R. S., chap. 28, sec. 53. The interest which the holder of the certificate has in the land, cannot be sold on execution: and although a court of equity might compel an assignment, or might order a sale by a receiver, yet without acquiring the certificate, in some way duly assigned, no person could acquire any claim to the land. The defendant being a *bona fide* purchaser and assignee for full value, without actual notice of any equity of the plaintiff, and also without constructive notice—for the fee of the land being in the state, the record of the plaintiff's mortgage was not such a notice—was entitled, on performing the conditions mentioned in the certificate, to receive a patent from the state, and on receiving it, owned the land without incumbrance. 2. Our statute “for the protection of married women,” gives to a *feme covert* no power to bind herself by a contract. *Wooster vs. Northrup*, 5 Wis., 245; *Phillips vs. Northrup*, 12 How., 17. The mortgage being a mere incident to the debt, any defense to the note would also be a defense to the mortgage. *Fisher vs. Otis*, 3 Chand., 83; *Martineau vs. McCollum*, 4 id., 153; *Blunt vs. Walker*, 11 Wis., 334. 3. To enforce any contract of a married woman to pay a debt, or to apply her property in payment of a debt, the debt must be shown to be an equitable one. The real consideration of the notes should therefore

have been set out in the complaint, showing it to have been an equitable debt for the benefit of Mrs. V. *Yale vs. Dederer*, 18 N. Y., 265, and cases there cited; *Curtis vs. Engel*, 2 Sandf. Ch. R., 287; *Cobine vs. Cynthia St. John*, 12 How. Pr. R., 333; *Wooster vs. Northrup*, *supra*.

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L. B. Caswell, for respondent:

1. The certificate was a "contract for the sale of real estate, creating an interest in land." *Whitney vs. The State Bank*, 7 Wis., 625; *Smith vs. Clarke*, *id.*, 563; *Bull vs. Sykes*, *id.*, 449; 5 *id.*, 551; R. S., chap. 28, sec. 38. 2. This interest was a part of the separate estate of *Mrs. Vanhoosen*. General Laws of 1850, chap. 44. A married woman, so far as her separate estate is concerned, was treated in equity like a *feme sole*. "Her written engagements, entered into on her own account, to pay money, were to be satisfied out of her own separate estate." *Yale vs. Dederer*, 18 N. Y., 265; see, also, *Albany Fire Ins. Co. vs. Bay*, 4 Coms., 9; 1 *id.*, 462; *Cramer vs. Comstock*, 11 How. Pr. R., 486; 22 Wend., 526; 20 *id.*, 570; 1 Hill. on Mort., 6-7; 3 John. Ch. R., 145; 17 Vesey, 365. And in this state, since the act of 1850, she may convey, mortgage or otherwise dispose of her estate, the same as if she were unmarried, although no personal claim can be made against her.

By the Court, COLE, J. We have no doubt that a person in possession of land under a school land certificate, or owning such a certificate, has an interest or estate in the land which may be mortgaged. These certificates are analogous to an ordinary land contract between individuals for the sale and conveyance of real estate. *Smith vs. Mariner*, 5 Wis., 551; *Smith vs. Clark et al.*, 7 *id.*, 551; *Whitney vs. the State Bank*, *id.*, 625. And although the fee of the land remains in the state, until the amount of the certificate is paid and the patent issues, still the purchaser takes an interest in real estate which may be sold, conveyed and mortgaged. See *Bull vs. Sykes et al.*, 7 Wis. R., 449. Of course the mortgage would be subject to the amount due the state. Neither could such a mortgage interfere with the right of the state to sell the land for non-payment of interest

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or taxes. But the mortgagee could easily protect himself against forfeiture by paying the amount due the state. We, therefore, consider it very clear, that *Almira Vanhoosen* had a mortgageable interest in the land mentioned in the complaint, and embraced in school land certificate No. 133. This being so, the certificate was sold and assigned by her to *Powers*, subject to the mortgage. The appellant *Silverthorn*, acquiring the interest of *Powers* in the certificate, took it subject to the same mortgage, and stood in his shoes. He cannot be said to be a purchaser without notice. The mortgage was recorded in the proper county, and he was bound to take notice of it. It is objected that the registry laws do not apply to such a mortgage; but why they do not, we fail to understand. The statute provides that the certificates themselves may be acknowledged and recorded like deeds of conveyance, and that an assignment of them in writing may be acknowledged and recorded in the same manner. Chap. 28, sec. 53, R. S., 1858. And we are unable to perceive any reason or principle, why a mortgage given by the owner of a school land certificate should not be recorded like other mortgages, and be governed by the same rules in respect to notice. In the present case, the appellant states, in his answer that he has paid the state the amount due upon the certificate, and obtained a patent for the land. If that be so, then the amount paid the state ought, in equity, to be considered the first lien upon the land, and the first to be paid out of the proceeds, if it comes to a sale. The mortgage being subject to the amount due the state on the certificate, the condition of the parties has not been essentially changed by *Silverthorn* paying up this amount and taking the patent. The respondent will only have to pay the appellant what he otherwise would have paid the state, in order to make his mortgage the first incumbrance. As already observed, the amount paid the state for the land will first be satisfied out of the proceeds of the mortgaged property, and the remainder applied in discharge of the mortgage until that is paid. We allude to the manner in which the proceeds of the property should be applied, for the purpose of making our views in regard to the rights and equities of the

parties more intelligible. We have no doubt but the mortgage is valid, and the answer of the appellant discloses no reason why it should not be foreclosed in conformity to the prayer of the complaint.

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It is alleged in the answer that *Almira Vanhoosen*, the maker of the notes and mortgage sought to be foreclosed, was, at the time she executed the same, a married woman, living and cohabiting with her husband, and, therefore, it is insisted that the notes and mortgage are void. This defense, if good, would be a little ungracious in view of some matters stated in the complaint, viz., that *Mrs. Vanhoosen* sold and assigned the certificate to *Powers*, with the express agreement that *Powers* would pay the notes and mortgages, and that the amount of these notes was considered a part of the purchase money, to be so applied and discharged by *Powers*. *Mrs. Vanhoosen* does not seek to avoid the foreclosure of the mortgage. Furthermore, we have held that a married woman may charge her separate property with the payment of an indebtedness, and that a court of equity can enforce such a contract by a proceeding *in rem* against the property charged. *Heath vs. Van Cott*, 9 Wis., 516. No personal remedy is sought against *Mrs. Vanhoosen*, but merely that the land be sold to pay the debt she has charged upon it. We can see no satisfactory reason why this should not be done.

We therefore think the demurrer to the answer well taken.

DINSMORE vs. THE RACINE & MISSISSIPPI RAILROAD COMPANY, and others.

A railroad company, engaged in constructing a railroad, to secure the payment of money borrowed for that purpose, gave a mortgage, by which they granted to the party of whom the loan was obtained, all their railroad, with its superstructure, track, and all other appurtenances, made or to be made, and all the right and title of the said company to the land on which said railroad was and should be constructed, together with all rights of way then acquired, or thereafter to be acquired by the said company, and including the depots,

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engine houses, shops, and other constructions at the termini and along the line of said railroad, and the parcels of ground on which the same were or should be erected, and all the land which should be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences and structures thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of the said company in, to, and concerning the same. *Held*, that said mortgage did not create any lien, as against a subsequent mortgage creditor, upon a tract of 235 acres of wood-land, *afterwards* acquired by the company, situate seven miles from said railroad, although said land was purchased and used by said company for the purpose of supplying said road with timber and fuel.

APPEAL from the Circuit Court for *Racine* County.

This action was brought by *Dinsmore*, as trustee for the Walworth County Bank, against the Racine and Mississippi Railroad Company and others, to foreclose a mortgage upon two hundred and eighty-five 60-100th acres of land in Racine county, alleged to have been executed by said company to one Allen, on the 2d day of December, 1857, to secure the payment of a note of said company for \$7000, and which note and mortgage were afterward assigned by said Allen to the plaintiff, for the use of said bank. Among the defendants to the action, was the Farmers' Loan and Trust Company, which filed an answer, stating that the real estate described in said mortgage was purchased and used by the said railroad company for the purpose of getting wood and timber therefrom, to be used on said railroad; that said mortgage was not given for the purchase money, but to secure a precedent debt due to the plaintiff; that said defendant held two mortgages executed to it by said railroad company, one dated the 1st of September, 1855, and the other on the 2d of June, 1856, and duly recorded about the time of their respective dates (copies of which were annexed to said answer); that more than \$100,000 was due for interest in arrear upon the bonds secured by each of said mortgages; that on the 10th of May, 1859, said railroad company by deed of surrender, delivered to said defendant possession of the property covered by said two mortgages, so far as it could be done by such deed, and by the officers of said company, and that said defendant immediately took possession of the same, so far as possession could be obtained by it, and since that time, as mortgagee in possession under said deed,

and in pursuance of covenants therein, had paid out for taxes, right of way, and other purposes authorized by said deed, \$250,000 over and above the net profits received from said road; that said defendant had caused said mortgage, dated September 1st, 1855, to be foreclosed by a decree of the district court of the United States for the district of Wisconsin, rendered on the 17th of May, 1859; and said defendant insisted that the mortgage executed to it on the 1st of September, 1855, was a prior lien to that of the plaintiff, upon the land described in the complaint, and a claim on said land prior and superior to that of the plaintiff, for all money expended by it since it took possession of said property, as it had a right, and was in duty bound, to make said expenditures as mortgagee in possession, and by virtue of an express stipulation in said deed of surrender. The answer also denied the execution by the railroad company, of the mortgage under which the plaintiff claimed.

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The language of the mortgage of September 1st, 1855, so far as it is descriptive of the property mortgaged, is recited in the opinion of the court, and need not be repeated here. The mortgage of June 2d, 1856, was upon the western division of the road, extending from Beloit to the town of Savanna, in Carrol county, Illinois, and uses in reference to that division, the same language, in its description and enumeration of the property mortgaged. The description of the property in the deed of surrender, was substantially the same, having application, however, to both divisions of the road.

On the trial, the plaintiff admitted all the matters stated in the answer of the Farmers' L. & T. Co., except the allegations that their mortgages were, or ever had been, a lien upon the land described in the complaint, and that said railroad company never executed the mortgage which the plaintiff was seeking to foreclose. It was also admitted by the parties, that the lands described in the mortgage under which the plaintiff claimed, were acquired by said railroad company after January 1st, 1856; that said lands were situate seven miles from the track of the railroad of said company; that the mortgage described in the complaint was given for money

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used in constructing said road ; that no actual possession of said land had been taken by said Farmers' L. & T. Co., under said deed of surrender ; and that the decree of foreclosure mentioned in the answer of said company, was entered by stipulation with said railroad company, and was in pursuance of, and in accordance with, said deed of surrender. Proof was introduced as to the execution by the railroad company, of the mortgage under which the plaintiff claimed.

The circuit court found that the mortgage mentioned in the complaint was executed by said railroad company, and was a valid and subsisting lien upon the lands described therein, and that said lands were not included in, or covered by, either of the mortgages executed by said railroad company to the Farmers' Loan and Trust Company ; to which finding the defendants excepted. Judgment in accordance with said finding, from which the defendants appealed.

Strong & Fuller, for appellants, argued that the railroad company mortgaged its property as an *entirety*, to the Farmers' L. & T. Co., and that the land purchased afterwards by the railroad company, for the purpose of supplying the road with timber and fuel, and used for that purpose, passed as an appurtenant—an accession and incident essential to the use and enjoyment of the principal thing granted. In support of this view the counsel cited and commented upon the following cases: *The Columbus, Piqua & Ind. R. R. Co. vs. Coe*, in Supreme Court of Ohio; *Phillips vs. Winslow*, 18 B. Monroe, 431; *Pierce vs. Emery*, 32 N. H., 484; *Seymour vs. C. & N. Falls R. R. Co.*, 25 Barb., 284; *Willink vs. Morris Canal Co.*, 3 Green, 377; *Grinnell vs. Trustees of S. M. & N. R. R. Co.*, Ohio Court Com. Pleas, cited by Redfield, 587; *First Mortgage Bondholders vs. Maysville & Lexington R. R.*, cited by Redfield, 590; *Williamson vs. N. A. & S. R. R. Co.*, cited by Redfield, 590; *Pennock & Hart vs. Coe and Coe vs. C. Z. & C. R. R. Co.*, and *Cooper & Clark vs. Ohio Central R. R. Co.*, all decided by Judge McLean; *Farmers' Loan & Trust Co. vs. Hendrickson*, 25 Barb., 484; *Hall vs. Sullivan R. R. Co.*, cited by Redfield, 578; *Shaw vs. N. Co. R. R. Co.*, 5 Gray, 162; *Platt vs. New York & Boston R. R. Co.*, 28 Conn., 544; *B., C. & M. R. R. Co. vs. Gilmore*,

37 N. H., 410; *S. & M. R. R. Co. vs. Morgan Co.*, 14 Ill., 163. June Term,
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Cary & Pratt, for respondents. [No argument on file.]

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By the Court, COLE, J. In the case of *The Farmers' Loan & Trust Company vs. The Commercial Bank* (unreported), we had occasion to consider, to some extent, the conditions of the mortgages made by the *Racine & Mississippi R. R. Co.* to the Farmers' Loan & Trust Company, and to determine whether certain property in controversy between the bank and the loan and trust company, were embraced within the terms of those mortgages. The property in that case consisted of certain railroad chairs, or irons used in fastening down the rails, which were acquired by the railroad company subsequent to the execution of the mortgages to the loan and trust company, and which had never been attached to or become affixed upon the road-bed. We did not think there was any language in the mortgages, which, by any fair construction, could be said to include the chairs thus acquired and thus situated, and we therefore held that the loan company could not recover possession of them by virtue of the mortgages. A motion for a rehearing has been made in that case, and three very able and elaborate arguments have been filed by the counsel for the loan company, in which the correctness of the reasoning and the soundness of the decision in that case are called in question. But I must say that, after a careful reading of those arguments, and an examination of the authorities cited, I still think that the railroad chairs were not covered by the terms of the mortgages. The reasons for this conclusion are quite fully given in the opinion filed, and I deem it unnecessary to repeat or enlarge upon them here.

But if it would be unreasonable so to construe the terms of the mortgages as to make them include the property claimed in that case, it appears to me it would be doing greater violence to the language of those instruments to say that the parties intended they should embrace the lands in controversy in this case. It is admitted that the lands described in the mortgage mentioned in the respondent's complaint, were

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acquired by the railroad company after the execution of the mortgage given by the railroad to the loan company upon the first division of the road; that these lands consist of nearly three hundred acres of woodland situated about seven miles from the road track; and that these lands were purchased and used by the railroad company for the purpose of getting wood and timber off the same to be used on their road. The clause in the mortgage given by the railroad company to the Farmers' Loan & Trust Company, which must include these woodlands—if they are embraced in it—is the following: The railroad company granted and sold, &c., to the Farmer's Loan & Trust Co., "all their railroad, with its superstructure, track and all other appurtenances, made or to be made in the state of Wisconsin, from its eastern termination in the city of Racine, to its western termination in the town of Beloit, and all the right and title of the said parties of the first part, to the land on which said railroad is and may be constructed, together with all rights of way now acquired and obtained, or hereafter to be acquired or obtained by the said parties of the first part, and including the depots, engine houses, shops and other constructions at the city of Racine aforesaid, and at said town of Beloit, and all other places along the line of said railroad, and the lots, pieces or parcels of land on which the same are or may be erected, and all the pieces of land which shall be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences, and structuary thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of the said parties of the first part, of, in, and to or concerning the same, * * * to have and to hold the said premises and every part thereof, with the appurtenances, unto the said parties of the second part," for the objects and trusts therein declared.

This mortgage recites that the railroad company were engaged in constructing a railroad from the city of Racine to the town of Beloit, and, to accomplish the work, needed, and were desirous of raising the sum of \$680,000, to secure the payment of which, with interest, the mortgage was given.

Now, the most that can fairly be claimed from the language describing the mortgaged premises and real estate is, that it was intended to embrace the railroad with its superstructure, track, and all appurtenances made or to be made, from its eastern termination to Beloit, with all the right and title of the railroad company to the land upon which the road had been or should be constructed, together with all rights of way acquired or to be acquired, including the depots, shops, engine houses, and other constructions at the termini and along the line of the road, and the lots upon which the same were erected, and all pieces of land which should be used for depot and station purposes. Assuming, for the time being, that this was a valid mortgage upon the subsequently acquired lands and real estate of the company which were necessary and proper for the right of way, depot grounds, engine houses and station purposes, still can it be claimed that the mortgage also included lands situated several miles from the line of the road, which did not belong to the company at the time the mortgage was made, and which, though convenient, are not necessary or essential to the operation of the road? It is said that these lands were purchased by the company for the wood and timber upon them, which were to be used upon the road. Upon the score of economy it might be desirable that a railroad corporation should own the woodland and coal beds from which it could obtain all necessary fuel. So perhaps it might be convenient for it to own pine lands from which it could obtain lumber for fences and bridges, and mills to manufacture the lumber; or a line of steamboats for the transportation of freight and passengers by water to and from the road. Still these things are not at all necessary for the full enjoyment and use of the road and franchises. A railroad corporation can purchase its fuel as well as a natural person. It could not have been contemplated by either party, that the company would buy timber lands several miles distant from the line of the road, for the purpose of profit or convenience, when those lands were not necessary for the use and enjoyment of the road. The lands and real estate spoken of in the mortgage were those upon which the road was to be constructed, or in which the

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company might acquire the right of way, or lots or parcels of land along the line of the road used or to be used for erecting thereon depots, engine houses, shops, and all such structures as might be necessary for the operation and business of the road, or upon which drains and embankments might be made for the protection and preservation of the same. It is the real estate along the line of the road, in immediate connection with it, and necessary for the operation of it, to which the mortgage in its terms relates. If, therefore, we were to assume that the parties intended that the mortgage should embrace all subsequently acquired real estate wherever situated, that remote from, as well as that which was in connection with the road, and necessary for its use and operation, we do not think the mortgage contains apt and proper language to carry such intention into effect. We therefore cannot see how the mortgage of the Farmers' Loan and Trust Company can hold these timber lands, as against the mortgage subsequently given, creating a specific lien upon them, unless it be by virtue of the doctrine of entirety, as it is defined and spoken of in the arguments of the counsel for that company. His position upon that point, if I understand it, is this: A railroad with its franchises is one entire thing, a unity, so that when a mortgage is given upon it *eo nomine*, the mortgage embraces and holds all the property of the company, of every name and nature, real and personal, whether fixtures or not, whether owned at the time of the mortgage or subsequently acquired, in whatever condition it may be, provided it was obtained for the necessary use of the road. Thus the railroad, with its franchises and property, being an indivisible thing, when a mortgage is once given upon it, the mortgage attaches to, and fastens upon, all property, of every kind, as soon as acquired by the corporation, and takes priority of every lien attempted to be created thereafter upon any specific part of the entirety. If this proposition is sound to the extent claimed, the mortgage of The Farmers' Loan & Trust Company, being first in time, would hold the subsequently acquired timber lands, although there was no language in it which could be said to fairly relate to them. For all subsequently acquired property, real

and personal, would pass as an incident or accessory to the principal thing mortgaged. I cannot adopt this view of a railroad, or think that such is the peculiar nature and character of the property belonging to these corporations. A railroad corporation, with its franchises and property, has undoubtedly many things peculiar to itself. But theoretically, I have great difficulty in considering it, with all those franchises and real and personal property, as being one entire and indivisible thing. My first conception of it is contrary to this idea. A railroad, with all its property and franchises, cannot, with much precision of language, be likened to a machine, or even a vessel. It is an attempt to compare things which have few, if any, points of resemblance. A railroad is defined by Webster to be "a road or way on which iron rails are laid for wheels to run on, for the conveyance of heavy loads in vehicles." This, I think, is the popular understanding of the term. There is no difficulty in conceiving of a railroad as separate and distinct from its rolling stock, cars, engines and depots. The idea of a railroad is complete without these accessories. We speak of the real estate belonging to a railroad, and of personal property belonging to it, without meaning that all these are inseparable from it. They do not form one entire thing which is incomplete without all these accessions. I can understand how a railroad corporation, *with its franchises*, may be said to be an entire, indivisible thing, a unity. But I cannot well conceive how a railroad, with all its property, real and personal, of every nature and character, can with accuracy be said to be an indivisible thing, nor do I think the law so regards it. If this doctrine be sound, consider one of the consequences, in this case. Does it not work a revolution in our registry laws? At the time the mortgage was given to the Farmers' Loan & Trust Company, upon the eastern division of the road, there was no statute authorizing a railroad company to mortgage its franchises, in force in this state. Neither was there any law giving to a mortgage made by a railroad company greater effect than was given to a mortgage by a natural person. If the mortgage of the Farmers' Loan & Trust Company became a prior lien upon the timber lands men-

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tioned in this case, by virtue of the doctrine of entirety, there could be no safety in depending upon the record. For a person going to buy these lands of the railroad company, would find nothing upon the record to apprise him that they had been mortgaged to that company. If he looked into that mortgage, he would find nothing in the description of the mortgaged premises which related to them. Finding the title of record in the railroad company unincumbered so far as he could see, he might buy or take a mortgage upon the lands, trusting to the registry law. Thinking that the same legal consequences attached to a mortgage given by a railroad company as would attach to one given by a natural person, he would find that the record was but a snare. But still, if this is the settled law of the land in reference to railroads and railroad property, such a person could only complain of his ignorance and folly.

This mortgage given the Farmers' Loan & Trust Company, was made by virtue of the general power of the railroad company to dispose of its property, and not under any law of the state authorizing such corporations to mortgage their rights and franchises. If the mortgage had been made by an individual, within the decisions of this court, it would not have bound his subsequently acquired property. If the mortgage in this case embraced in its terms these timber lands, we might have to consider whether it did not fall within the principle of our decisions upon that subject; but it does not. The mortgage of the Farmers' Loan & Trust Company can only hold these lands by virtue of this doctrine of entirety. We have endeavored to show that in reason, and from the nature of railroad property, there is no ground for saying that a railroad, with all its rights, franchises and property, real and personal, is an indivisible, entire thing. Practically, we believe, they are not so regarded. Mortgages are given upon the personal property of railroads, or upon some portion of it, or upon some portion of the real estate, or a portion of the road. The property has been treated as though it might be separated, and appropriated to the payment of debts, without destroying the integrity of the company. We have been referred to several cases, however, in which, it is

insisted, this doctrine of the entirety of a railroad and its property is recognized; and it is claimed that the principles of those decisions show that the mortgage of the Farmers' Loan & Trust Company attached to, and became a lien upon, these timber lands, before the mortgage executed by the railroad company to Allen. These cases are *The Farmers' Loan & Trust Co. vs. Hendrickson*, 25 Barb. S. C. R., 484; *Phillips &c. vs. Winslow*, 18 B. Mon. R., 431; *Willink vs. The Morris Canal & Banking Co.*, 3 Green (N. J.), 377; *Pierce vs. Emery*, 32 N. H., 484; *The Columbus, Piqua & Indiana R. R. Co. vs. Coe*, (unreported case, decided by the supreme court of Ohio, April, 1860); *Seymour et al. vs. The Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. S. C. R., 284.

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In the *Farmers' Loan and Trust Company vs. Hendrickson*, the question submitted for the judgment of the court was whether the judgment creditors of the Flushing Railroad Company, by virtue of the judgments and executions, and the levies made by the sheriff, acquired a lien upon the property levied on as the property of the company, superior in law to the claim of the plaintiffs under and by virtue of prior mortgages executed by the railroad company. The property levied on was a part of the rolling stock, consisting of engines, tenders, and passenger, freight and hand cars. The Farmers' Loan and Trust Company claimed the property by virtue of two mortgages executed by the company upon the land forming the road way, and all lands occupied for depot buildings, engine houses, &c., together with the superstructure and buildings thereon, and all rails and other materials used or to be used upon the road, &c., engines, tenders, cars, tools, &c., with the tolls, rent, and income, and all franchises, rights and privileges of the company. The property had been purchased and placed upon the road intermediate to the time of giving the two mortgages, and was in actual use when the levy was made. The mortgages had never been filed in the offices where chattel mortgages were required to be filed, and the question was, whether the property levied on was chattels or fixtures. The court held that by the general principles of law applicable to fixtures, the engines, tenders, cars &c., were to be deemed fixtures, and would pass

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under the mortgage of the track and lands occupied by the company, instead of being subject to the lien of judgments recovered subsequent to the mortgage.

In *Phillips vs. Winslow*, the judgment creditors of the railroad levied upon two freight cars on the track, eight car wheels at the car shop, twenty-five cords of fire wood obtained for the use of the engines, and five hundred bushels of stone coal at the machine shop. The company had previously executed a mortgage purporting to convey all of its present and in future to be acquired property, the road made and to be made, including the right of way and land occupied thereby, the superstructure and tracks thereon, and all rails and other materials used thereon or procured therefor, with the engines, tenders, cars, tools, materials and all other personal property, with the tolls, rents, and incomes, and all the rights and franchises of the road. The court held that this mortgage included the cars, wheels, and fire-wood obtained for the use of the engines, and the coal for the use of the machine shop, as things incident to, and indispensable to the use of, the thing conveyed. The court say: "The company by its charter was authorized to borrow money, and execute such evidences of indebtedness as might be deemed proper, and pledge the property, franchises, rights and credits of the corporation, for any loan, liability or contract which it had made or should make. We do not deem it necessary to decide in this case, whether, under ordinary circumstances, a mortgage on subsequently acquired property would be valid or pass any title to the property. These deeds were made under the power conferred by the charter, and their validity and effect have to be determined by the provisions of the charter, and not by the general law on the subject."

In *Willink vs. the Morris Canal and Banking Company*, the canal company had been authorized to construct a canal to connect the waters of the Delaware with the waters of the Passaic. By a subsequent act, the company were authorized to continue the Morris Canal to the waters of the Hudson at or near Jersey City. The company was authorized to borrow money, and for securing the due payment thereof, to hypothecate by way of trust, mortgage, or otherwise, the Morris

Canal, with all its privileges, appendages, and appurtenances, and all the chartered rights of the company. The company, having made a loan, executed a mortgage by authority of the act, "upon all and singular the Morris Canal so called, being the canal authorized by the laws of the State of New Jersey, as the said canal has been laid out through the several counties of Warren, Sussex, Morris, Essex and Bergen in the State of New Jersey, and being now in a course of completion from the Delaware to the Hudson river, together" &c. At the time of the execution of the mortgage, the canal had not been constructed from the Passaic to the Hudson, nor had the land been purchased upon which the canal was subsequently constructed. The route had been surveyed, though a part was subsequently varied. The court held that the mortgage covered the entire canal from the Delaware to the Hudson, and also the pier at Jersey City, which was constructed upon land purchased after the execution of the mortgage.

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The chancellor said, "The act clearly contemplated a mortgage on the entire canal with its appendages and chartered rights. We must then see what was actually covered by the terms of the mortgage." And he holds, from the description of the mortgaged premises, that it was the clear intention of the parties to mortgage the entire canal from the Delaware to the Hudson, and that the language can mean nothing else.

In *Pierce vs. Emery*, an act of the legislature gave a railroad corporation authority to issue bonds for a loan of money, and, for security, to make a mortgage to trustees of all the property, and all the rights, franchises, powers and privileges of the corporation, and in the mortgage to give the trustees power, on breach of the condition, to sell the real and personal estate, and all the rights, franchises, powers and privileges named in the mortgage, by a deed which should convey to the purchasers all the rights, franchises, powers and privileges which the corporation possessed, and the use of the railroad, with all its property and rights of property, for the same purposes and to the same extent that the corporation could use the same if the deeds had not been made, sub-

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ject to the same liability as to the use of the road, that the corporation would have been under, if the deed had not been made; and the corporation having issued bonds, and made such a mortgage, it was decided that the trustees would hold under it property afterwards acquired by the road, against other creditors who claimed the same property by virtue of a later mortgage. The court held that such a mortgage was in substance and effect, a conveyance under the act, of the road and corporation, as an entire thing, and that subsequently acquired property became a part of the original subject of the mortgage by accession; that if the company mortgaged its franchises and corporate rights, it conveyed away the right to take and hold property, and that subsequently acquired property, immediately upon its vesting in the corporation, would as an incident and by accession, become a part of the thing originally mortgaged, and of the mortgage security. In the last three cases, mortgages were executed by the corporations under special authority given by the legislature, and the courts gave to the mortgage in each case such effect as they thought the legislature intended it should have. But I do not understand any of them to decide, upon general principles of law applicable to railroad mortgages, that they hold subsequently acquired property, on the ground that a railroad, with its franchises and property, is an indivisible, entire thing. On the contrary, in the case of *The Boston, Concord & Montreal R. R. Co. vs. Gilmore*, 37 N. H. R., 410, the court held distinctly that locomotive engines, and freight and passenger cars of a railroad company, were liable to attachment, when not in actual use, like other property.

In the case of *Sangamon & Morgan R. R. Co. vs. County of Morgan*, 14 Ill. R., 163, the idea that a railroad, with its property, real and personal, is an entirety, was pressed upon the consideration of the court, but the doctrine was not sanctioned. The court say, "The road and furniture do not constitute one entire estate, either real or personal. The furniture is personal property, and constitutes no part of the road, which is real property. It is no more a part of the road than is the furniture of a house a part of the house."

The same view in respect to the property of a railroad cor-

poration is advanced in the case of the *Columbus, Piqua & Indiana R. R. Co. vs. Coe*. The court there say: "The corporation having acquired an interest in the land for the construction of its road, in that construction affixes to the land certain things—the timber and iron for the track, the stone and timber for the bridges and culverts. It also erects depots and structures for a supply of water. The road is not regarded as constructed and prepared for use until such things are affixed. But when the road is thus constructed and ready for use, other things are requisite for that use—locomotives, cars, and other articles and materials, some of which are consumed in the use, and the supply has to be from time to time renewed. Now we think there is a manifest distinction between the road as constructed for use, and the various things employed in that use; and that the latter cannot, with propriety, be regarded as constituting a part of the real estate, but as the personal property of the corporation." This view would not be correct under our statutes, which expressly make the rolling stock of railroads fixtures. Section 34, chap. 79, R. S., 1858.

It is true there are expressions in these cases to the effect that, as between the company and the first mortgagee, when the equities of other creditors do not interfere with this rule, the property will be considered as an entirety. Still I do not understand that in any of them it is adjudged upon general principles of law applicable to this kind of property, that a railroad, with all its real and personal property of every nature, obtained for the use of the road, will be regarded and treated as one indivisible, entire thing. And we know of nothing in the character or use of this property, which requires the application to it of any such rule of law. And conceding that the mortgage of the Farmers' Loan & Trust Co. embraced, and was a valid lien upon, all property therein described, whether the same was then owned by the company or was subsequently acquired for the purposes of the railroad, still we do not think it should be construed so as to include the timber lands in controversy in this suit. They were outside of the legal limits of the railroad, distinct from it, and not necessary for its proper use and operation. *Sey-*

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It follows from these views that the judgment of the circuit court must be affirmed.

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In an action to foreclose a mortgage given by a husband and wife to secure the payment of their bond (executed by her during coverture), it is erroneous to render a personal judgment against the wife as well as the husband, for any deficiency which may remain due after the sale of the mortgaged premises, unless it is shown in the complaint that the contract related to her separate property, and was one upon which she might become liable to a personal judgment.

That part of the judgment of the inferior court, which is against the wife personally for such deficiency, may be reversed, and the residue of the judgment be affirmed.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is stated in the opinion of the court.

Coon, Buchan & Cotton, for appellants.

James S. Brown, for respondent.

November 19. *By the Court*, COLE, J. This was an action to foreclose a mortgage. The mortgage was executed by *Eliza Adelaide Wiel* and *Baruch S. Weil*, to secure the payment of a certain bond in the penal sum of thirty-five thousand dollars, conditioned, &c., given by them to the respondent. The complaint represents that *Eliza A.* and *Baruch S.* were husband and wife at the commencement of the action. *Mrs. Weil* made default. Judgment of foreclosure and sale was rendered, and also a judgment against *Mrs. Weil* and her husband, for any deficiency the sheriff might report due after the sale of the mortgaged premises. And the only question we have to consider is, whether a personal judgment could be taken against *Mrs. Weil*, for any deficiency which might be found due after the application of the proceeds of the sale.

We suppose it could not. In the case of *Wooster vs. Northrup et al.*, 5 Wis., 245, this court decided that the act of the legislature entitled "an act to provide for the protection of married women in the enjoyment of their own property," did not relieve the wife during coverture from her disability at common law to make contracts in such a manner as to become liable to a personal action upon them. This decision has been very much shaken, if not overruled, by the case of *Conway vs. A. Hyatt Smith et al.*, decided at the present term, in which a majority of the court held that a married woman may contract in respect to the improvement and management of her own property, and render herself liable to a personal action upon such contracts. I felt constrained to dissent from the opinion in that case, for reasons not necessary to be stated here. Still, at best, we all think that a party ought not to have a personal action upon a contract made by a married woman during her coverture, without showing in the complaint that the contract related to her own separate property, and was one upon which she might become liable to a personal judgment. This not being done in the complaint in this case, it was erroneous to take a personal judgment against *Mrs. Weil* for any deficiency.

The counsel for the respondent contends that it nowhere appears in the case that *Eliza Adelaide* and *Baruch S. Weil* were baron and feme at the time they executed the bond and mortgage. But this is a mistake as to what does really appear upon the record. The bond and mortgage both set forth that they are made by "*Eliza Adelaide Weil* and *Baruch S. Weil, her husband*, both of," &c., showing clearly that they were married at the time these instruments were executed.

So much of the judgment of the circuit court as gives a personal judgment against *Mrs. Weil* for any deficiency, must be reversed, and the judgment of the circuit court, in all other respects, is affirmed.

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1860.

ROGERS
v.
WEIL et al.

June Term,
1860.

PERELES
v.
ALBERT et al.

PERELES vs. ALBERT and another.

The last clause of sec. 29 of the Code, which declares that if the county designated as the place of trial in the complaint "be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county," relates not only to what precedes it, in the same section, but also to the preceding sections, 27 and 28, of the Code, and qualifies their meaning. If a defendant fails so to demand that the trial be had in the proper county, it may be had in the county designated in the complaint.

An action was brought in the circuit court of Milwaukee county, to foreclose a mortgage on land lying in Washington county, and process was served on one of the defendants in Milwaukee county, and on the other in Washington county, where they respectively resided. The defendants did not appear to the action. *Held*, that the circuit court of Milwaukee county had jurisdiction of the action, and could render judgment of foreclosure therein.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is stated in the opinion of the court.

Thorp & Shelley, for appellants.

Smith & Salomon, for respondent.

November 19. *By the Court*, COLE, J. This was an action to foreclose a mortgage, and was commenced, and judgment of foreclosure entered, in the circuit court of Milwaukee county, the mortgaged premises being in the county of Washington. The appellants were personally served with process, one in Milwaukee county and the other in Washington county, where they respectively resided. They made no appearance to the action. The only question raised upon the appeal is, whether the circuit court of Milwaukee county has jurisdiction of an action to foreclose a mortgage on lands lying in another county. We are inclined to the opinion that it has.

The constitution confers upon the circuit courts original jurisdiction in all matters, civil and criminal, within the state, not excepted in the constitution, and not prohibited by law. (Sec. 8, Art. VII.) And in what were equity cases under the old system, when no rule of court or statute is provided to regulate the practice, it is governed by the rules of the high court of chancery in England. *Burrall vs. Eames*, 5 Wis., 260. This case, however, was commenced under the

Code, and we have therefore to look at its provisions to settle this question of practice.

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PARKES
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Section 27 of the Code provides that actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by statute: 1. For the recovery of real property, &c. Subdivision 3. For the foreclosure of a mortgage of real property. Section 28 declares that another class of actions shall be tried in the county where the cause, or some part thereof, arose, subject, &c. Section 29 provides that in all other cases the action shall be tried in the county in which the defendants, or any of them, shall reside at the commencement of the action. The last clause of section 29 reads as follows: "If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand, in writing, that the trial be had in the *proper county*, and the place of trial be thereupon changed, by consent of parties or by order of the court, as provided in this section." This clause of the section we think relates, not only to what has preceded it in section 29, but also refers to the two preceding sections, qualifying and restraining their language. So that, if the plaintiff designates in his complaint the wrong county as the place of trial, the defendant's remedy is to demand that the trial be had in the proper county. And when he fails to do so, we think there is no error in the judgment on account of the trial taking place or judgment being rendered in a wrong county. This is the construction placed upon the corresponding provisions of the New York Code by the courts of that state in the following cases: *Miller vs. Hull*, 3 How. Pr. R., 324; *Beardsley vs. Dickinson*, 4 id., 81; *Chubbuck vs. Morrison*, 6 id., 367; *Bangs vs. Selden*, 13 id., 163; *Same case*, id., 374; and we can see no valid objection to it. It is true that what constitutes the latter clause of section 29 of our Code, forms an independent section of the New York Code, but still we think this arrangement does not essentially vary or change the scope and intention of these various pro

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visions. As already stated, we think that clause relates as well to the two preceding sections as to the section of which it accidentally forms a part. The design of the Code probably was to permit the plaintiff to select the county in which the action was to be tried, subject to the right of the defendant to have it changed to "*the proper county*." If the defendant does not, before the time for answering expire, demand, in writing, that the trial be had in the proper county, then the action is to be tried in the county selected by the plaintiff.

We can see no inconvenience or hardship likely to grow out of this practice, since the defendant always has the action so far under his control that he may insist upon its being tried in the proper county.

We think the circuit court of Milwaukee county had jurisdiction of the action, and could render judgment of foreclosure therein.

The judgment of the circuit court is therefore affirmed, with costs.

KIMBALL VS. SPICER.

The decision in *Downis vs. Hoover*, *ante* p. 174, as to the right of a railroad company to assign the amount due to it on a stock subscription, referred to and followed.

Where the summons and complaint in an action showed that A was the plaintiff, and that he had a cause of action as the assignee of B, a statement that *B was the plaintiff* (occurring in a printed form which was used in drawing up the complaint) should be rejected as surplusage, and is not a ground of demurrer.

It is not necessary in a pleading to aver that a corporation whose name only has been changed, retains, under its new name, its former rights.

A complaint averred that the written promise sued upon had been assigned by the promisee to the plaintiff, who thenceforth continued "to hold, own and possess the same for the benefit of" a certain bank, and was entitled to the sum due "for the benefit of" said bank. *Held*, on demurrer, that the plaintiff was entitled to bring the action in his own name, as a trustee of an express trust.

APPEAL from the Circuit Court for *Kenosha* County.

This action was brought to recover the amount of a sub-

scription made by the defendant to the stock of the Kenosha and Beloit Railroad Company. The complaint, after stating the contract of subscription, and the making and giving of notice to the defendant of various calls, under which the amount subscribed had become due, averred that afterwards the name of said railroad company was changed by an act of the legislature to the "Kenosha and Rockford Railroad Company," "by which name it from thence has been recognized, and is the plaintiff in this action." It also averred that said Kenosha and Rockford Railroad Company afterwards duly assigned said stock subscription to the Kenosha, Rockford and Rock Island Railroad Company (a corporation organized under an act of the legislature authorizing the Kenosha and Rockford Railroad Company, in this state, and another corporation under the same name in Illinois, to consolidate), which afterwards duly assigned the same, for value received, to the plaintiff, "who from thence hitherto has continued to hold, own and possess the same for the benefit of the Kenosha County Bank, and is entitled to the money due thereon for the benefit of the Kenosha County Bank aforesaid."

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The defendant demurred to the complaint, on the grounds that it did not show facts sufficient to constitute a cause of action, and that there was a defect of parties plaintiff, and urged in support of the demurrer, 1. That a stock subscription is not assignable, so that the assignee can bring an action to recover it in his own name. 2. That the complaint, in one part of it, alleges that the Kenosha and Rockford Railroad Company is the *plaintiff*, whereas *Kimball* is the plaintiff, as appears from the summons and from other parts of the complaint. 3. That the complaint states that the name of the Kenosha and Beloit Railroad Company was changed to the Kenosha and Rockford Railroad Company, without averring that the latter company succeeded to the rights of the former. The circuit court held that the third objection was well taken, and upon that point sustained the demurrer, with leave to amend. The plaintiff excepted to the order, and appealed.

J. J. Pettit, for appellant.

O. S. & F. H. Head, for respondent.

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KIMBALL
v.
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November 19.

By the Court, COLE, J. In the case of *Downie vs. Hoover* (unreported), this court held that a subscription to the capital stock of a railroad company could be assigned and transferred by the company like any other contract, and that the assignee could recover the amount of money due upon the same from the stock subscriber. This fully disposes of the first objection to the complaint in this case, taken in the demurrer.

The second objection, that in the 18th folio of the complaint it alleges that the Kenosha & Rockford R. R. Co. is the plaintiff in the action, while it appears from other parts of the complaint and from the summons that Kimball was the plaintiff, certainly has no weight. We agree entirely with the view of the circuit court upon this point, that those words were mere surplusage and should be disregarded. It is easy to perceive that it was an oversight in the pleader, in not striking out those words from the printed form. But they could do no harm. Neither do we consider the third objection to the complaint well taken. The complaint states that the corporate name of the Kenosha & Beloit R. R. Co. was changed by an act of the legislature to the name of the Kenosha & Rockford R. R. Co.; and it is insisted that there should be an averment that the corporation by the latter name succeeded to all the rights and liabilities of the company by the former name. The circuit court seemed to think some such averment necessary, and upon that ground sustained the demurrer, with leave to amend. It appears to us, however, that such an averment would be a mere conclusion of law, and not a traversable fact, which should be stated in the complaint. It is clear that the effect of the statute was merely to change the name and not the identity of the corporation, and of course such legislation could not change, alter or vary the legal rights and liabilities of the company. But to aver this would be to plead a rule of law.

A still further objection has been taken to the complaint, namely, that Kimball could not maintain the action for the benefit of the bank. Upon this point the complaint alleges, in substance, that the Kenosha, Rockford & Rock Island R. R. Co., by its duly authorized agent, and in pursuance of a

resolution of the board of directors, for value, &c., sold, assigned and transferred to the plaintiff in the action the stock subscription of the defendant, who from thence hitherto has continued to hold, own and possess the same for the benefit of the Kenosha County Bank, and is entitled to the sum of money due and owing from the defendant thereon, for the benefit of the Kenosha County Bank aforesaid. Now since section 12, chapter 122, R. S., 1858, requires every action to be prosecuted in the name of the real party in interest, it is contended that this action should have been brought in the name of the bank, instead of that of *Kimball*. But we are of the opinion that the allegations in the complaint bring the case strictly within section 14 of the same chapter, and enable *Kimball* to maintain the suit. Section 14 provides that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted; and a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. Now since the complaint alleges that the stock subscription of the defendant was transferred and assigned to *Kimball* for the benefit of the bank, this constitutes him "a trustee of an express trust," within the meaning of the above section. (See *Grinnell vs. Schmidt*, 2 Sandf. R., 705.)

The order of the circuit court, sustaining the demurrer, must be reversed, and the cause remanded for further proceedings.

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HASTINGS et al.
v.
GWYNN.

HASTINGS and another vs. GWYNN.

Complaint on an account alleged to have been due by the defendant to a certain firm, who assigned it (in 1857) to the plaintiff, of which assignment the defendant had notice. Answer, that defendant had not "sufficient information to form a belief," whether said account had been assigned to the plaintiff, and that the defendant (in 1858) settled said account with one of the part-

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ners, who was the authorized agent of the firm, and gave his negotiable note for the balance due thereon, which had been transferred to some third person: *Held*, on demurrer, that the answer did not contain a sufficient denial of the assignment. Such denial should have been of either *knowledge* or information sufficient to form a belief, &c.

Held, also, that whether the answer would have shown a good defense or not, if it had alleged that the execution of said note was before notice of the assignment of said account, it was clearly defective in not containing that allegation.

APPEAL from the Circuit Court for Dodge County.

The case is stated sufficiently in the opinion of the court.

H. W. Lander, for appellants, contended that the allegation in the answer, that the defendants had not sufficient information to form a belief whether the indebtedness upon which suit was brought had been assigned to the plaintiffs, and whether they were then the owners of the same, did not amount to a denial but to an admission of the allegations in the complaint. Howard's Code, 235; Van Santvoord's Pl., 409-10, 436; *Chapman vs. Palmer*, 12 How., 37; *Edwards vs. Lent*, 8 id., 28; *Fales vs. Hicks*, 12 id., 153; *Elton vs. Markham*, 20 Barb., 343. The court will not assume in favor of a defendant anything he has not averred. *Cruger vs. Hudson R. R. Co.*, 2 Kern., 190.

H. D. Patch, for respondent. [No argument on file.]

November 19. *By the Court*, PAINE, J. This action was brought to recover the balance of an account, which the complaint alleges accrued against the defendant, in favor of the firm of Heaths & Farringtons, and was assigned to the plaintiff. It also avers that the defendant had notice of the assignment.

The only defense which the answer attempts to set up, is that the defendant had settled the account with one of the Heaths, who was the authorized agent of the firm, and had given his negotiable note for the amount due, which had been transferred to some third person, and was still outstanding. This answer was demurred to, and the court below overruled the demurrer, but for what reason we are unable to perceive. The complaint avers that the account was assigned to the plaintiff in November, 1857, and that the defendant had notice of it. The answer simply denies "suf-

ficient information to form a belief" whether this allegation of the complaint was true. This denial is insufficient, and the allegation must therefore be taken as admitted. The denial should have been of either "*knowledge* or information sufficient to form a belief." Van Santvoord's Pleadings, 436; 8 How., 28. The existence of the account and its assignment to the plaintiff, and notice to the defendant of that assignment, were all to be taken as admitted by the answer. Clearly, then, it was no defense to say that the defendant had settled with the assignors, without saying that he did so before notice of the assignment. The allegations in the complaint, which are admitted, being sufficient to show a *prima facie* liability, the burden was then on the defendant, if he sought to show a settlement with the assignors, to allege one which would amount to a defense. And this he could not do without averring that it was made before notice of the assignment. Whether the answer would have been sufficient with such an averment, it is not necessary to determine. But we think it is clearly insufficient without it.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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YATES
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YATES VS. THE CITY OF MILWAUKEE.

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The charter of the city of Milwaukee gives the common council power to regulate the place and manner of selling hay within the city, and an ordinance forbidding, under a penalty of not less than five, nor more than ten dollars, the exposing of any load of hay for sale, in certain wards of the city, without first having such load weighed by the attendant of some established and sealed city hay scale, and obtaining from him a certificate of the weight (for which said attendant was allowed to charge twelve cents), to be exhibited to the purchaser of the hay, before receiving payment therefor, is not unreasonable, oppressive, or repugnant to the constitution and laws of the state.

The fact that the city appointed a person to be weigher of hay and inspector of wood in said wards, on condition that he would pay to those wards \$500 per annum, is no defense to an action for a violation of said ordinance.

APPEAL from the Municipal Court for *Milwaukee* County.

The case is stated in the opinion of the court.

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Small & Cogswell, for appellant, contended that the ordinance in question was void, as being unreasonable, and in restraint of trade. 1 Bacon's Abr., "By-Law," p. 545, and cases cited; Com. Dig., "By-Law," C. 6; 2 Kyd on Corp., p. 107; *Parry vs. Berry*, Comyns, 269; *Dunham vs. Trustees of Rochester*, 5 Cow., 462; Willcock on Mun. Corp., 145, and cases cited; *Kennebec & Portland R. R. vs. Kendall*, 31 Me., 470; Ang. & Ames on Corp., 198; *Com. vs. Worcester*, 3 Pick., 462; *Norris vs. Staps*, 1 Hob., 210; *Chamberlain of London's Case*, 5 Coke, 62. 2. That if a municipal corporation, in framing a by-law, exceed in any respect its statutory power, the by-law is void (*Kirk vs. Nowill*, 1 Term R., 118; *Gosler vs. Corp. of Georgetown*, 6 Wheat., 597; *Mayor, &c., of N. Y. vs. Ordrenan*, 12 John., 122; *Rochester vs. Collins*, 12 Barb., 559; *Dunham vs. Trustees of Rochester*, *supra*); and that the common council, under the city charter, had no authority to require the fee provided for in said ordinances. 3. That the resolution providing for Huegin's appointment as city inspector, created a monopoly (1 Kyd on Corp., 36, 312), and was therefore void (*Davenant vs. Hurdis*, Moore, 576; Willcock on Mun. Corp., § 390; Rolle's Abr., 364; Bacon's Abr. "By-Law"); that it was in the nature of a sale of an office, and therefore void (2 Black. Comm., 37; 3 Kent's Comm., 456; *Parsons vs. Thompson*, 1 H. Bl., 322; *Town of Meredith vs. Ladd*, 2 N. H., 517; 1 Story's Eq. Jur., § 295; *Becker vs. Ten Eyck*, 6 Paige, 68; R. S., chap. 169, sec. 54); or was a grant of a franchise which the corporation had no right to grant (*People vs. Trustees of Geneva Col.*, 5 Wend., 217; 3 Kent's Comm., 568; *State of N. Y. vs. Mayor, &c.*, 3 Duer, 119; *Milhau vs. Sharp*, 17 Barb., 435); and that if the resolution and agreement constitute a contract, it was such a one as the corporation could not make, because it would thereby deprive itself of the power to remove Huegin for improper conduct in office. *Presb. Church vs. Mayor*, 6 Cow., 538; and cases above cited from 6 Wheaton, 17 Barbour, and 3 Duer.

Joshua La Due, for respondent, contended that the ordinance was not unreasonable nor in restraint of trade, and was valid (Priv. Laws, 1852, chap. 56, secs. 3 and 20; *Stokes &*

Gilbert vs. City of N. Y., 14 Wend., 87-89; *Taylor vs. Griswold*, 2 Green, 103; *Vanderbilt vs. Adams, Treas.*, 7 Cow., 349; *Bush vs. Seabury*, 8 John., 419; *Vandine's Case*, 6 Pick., 187), and that the validity of the contract between the city and Huegin was immaterial to the question whether *Yates* had violated the ordinance and incurred its penalty.

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By the Court, COLE, J. This action was commenced by the city of Milwaukee, in the municipal court of that city, to recover a penalty for the violation of a city ordinance, prescribing the manner and place of weighing and selling hay within the city limits. The appellant admitted that he sold the hay within the limits of the 7th ward of the city, and that he refused to have it weighed upon the city hay-scales proper, and pay the fee imposed by the ordinance for weighing the same. It appears that he had previously had the hay weighed upon the hay-scales of Elmore & Brothers, within the limits of the city, whose clerk certified to the weight of the same upon a card, which the appellant had in his possession at the time of the exposure and sale of the hay. The city ordinance was admitted in evidence without objection; indeed, the record does not show that the appellant took any exceptions upon the trial to any of the rulings of the court.

The city ordinance provided, in substance, that no person should be allowed to expose for sale any load of hay, in the first and seventh wards of the city, without having such hay weighed as therein provided: that before offering any load of hay for sale within these limits, such hay should be duly weighed, and a written certificate of the weight thereof obtained from the attendant of some established and sealed city hay scale within the city limits; and that the owner of such hay should exhibit his ticket to the purchaser before being entitled to receive any pay therefor. The attendant of the hay scale was entitled to receive the sum of twelve cents for weighing each load of hay, &c. The penalty imposed for violating the ordinance was not less than five, nor more than ten dollars, with costs of prosecution.

There can be no doubt that the common council had am-

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ple authority to pass an ordinance regulating the place and manner of selling hay within the city. This power is expressly conferred upon them, *totidem verbis*, by the charter (subd. 20, sec. 3, chap. 4, Charter of the City of Milwaukee, p. 69, Laws 1852, chap. 56). Neither do we see any thing which would authorize us in declaring the ordinance unreasonable or oppressive, or repugnant to the constitution and the laws of the state. It is not an ordinance in restraint of trade, but a most salutary regulation of it, and designed to prevent fraud and imposition upon the citizens.

Stokes & Gilbert vs. The Corporation of the City of New York, 14 Wend, 87, is a case precisely in point. In that case the court held that an ordinance of the corporation of the city of New York, requiring anthracite, or hard coal, to be weighed by weighers appointed by the corporation, was a valid by-law, reasonable, and not in restraint of trade; and sustained an action for a penalty arising from a violation of it. (See *Vanderbilt vs. Adams, &c.*, 7 Cowen's R., 349; *Bush vs. Seabury*, 8 John., 418; *Vandine, Petitioner, &c.*, 6 Pick., 187; *Commonwealth vs. Worcester*, 3 id., 462; A. & A. on Corp., sec. 336, and notes). "Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated." 6 Pick., 190. The regulation in this case was wise and proper, and well calculated to prevent fraud. And we do not think that the charge for weighing a load of hay, and giving a certificate of the weight, was exorbitant. It was but twelve cents—a trifle, when we take into account the cost and expense of procuring and keeping up such scales.

On the trial in the court below, the appellant offered in evidence certain resolutions of the common council relating to the appointment of one Peter Huegin, weigher, &c., and a contract between him and the city. We think this evidence was irrelevant, but still we see nothing in it which can aid the appellant. Huegin, it appears, was appointed inspector of wood and weigher of hay in the district composed of the first and seventh wards of the city, on condition of paying to those wards, for their exclusive benefit, five hundred dollars per annum. The scales were treated as the

property of those wards. Several objections are taken to these resolutions and to this agreement, but we think they are all untenable. It is contended that they created a monopoly and a sale of a public office. But how this result can be said to follow from these resolutions and this contract, we fail to understand. The price for weighing a load of hay was fixed by an ordinance of the city. Was it unreasonable or exorbitant? We think not. What matter whether the city gave the weigher all the fees for attending upon the scales, or whether the weigher was willing to attend upon them, take pay for his labor out of the proceeds, and pay the remainder into the city treasury, or in lieu thereof, give a gross sum? We certainly can see no difference, so far as the person having hay to be weighed, is concerned. The arrangement might have been a very wise and proper one for aught that appears upon this record.

The ordinance being valid and reasonable, we cannot see why a recovery should not be had for a violation of it.

The judgment of the court below must, therefore, be affirmed, with costs.

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v.
COSTIGAN et al.

JONES VS. COSTIGAN and others.

The owner of a mortgage upon real estate, who has obtained a judgment of foreclosure and sale, may maintain an action for an injury done to the premises before the sale, which impaired the security and prevented the full amount of the debt from being realized, the mortgagor being insolvent, and the act having been committed wrongfully and fraudulently, with intent to injure the owner of the mortgage.

Where such injury is committed by the mortgagor, or others acting by his direction, knowing his insolvency, and the existence of the security, and that the act complained of will impair it, the action should be sustained.

Where the owner of the mortgage has assigned it for the benefit of his creditors, the assignee is the proper plaintiff in an action for such an injury done after the assignment.

APPEAL from the Circuit Court for *Jefferson* County.

The complaint in this action alleged that, during the pen-

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COSTIGAN et al.

dency of a suit to foreclose a mortgage on a lot in Watertown, executed by *Costigan*, one of the defendants herein, the mortgage was assigned to the plaintiff by the mortgagees, in trust for their creditors; that after judgment of foreclosure and sale in said suit, the mortgaged premises were advertised for sale; that at the time of such advertisement, said mortgagor was, and ever since had been, insolvent, owning no property out of which any deficiency in the proceeds of such sale could be collected; that after such advertisement and before the sale, the defendants, well knowing these facts, and that the said lot was inadequate security for the payment of the moneys due and to become due on said mortgage, and intending to injure and defraud the plaintiff, wrongfully and fraudulently removed the windows and doors from the dwelling house on said premises, and did other injuries to the same, by reason whereof the said lot, when sold pursuant to said judgment, on, &c., (which sale had been duly confirmed), was sold for \$500 less than it would otherwise have brought, and the plaintiff had failed in obtaining satisfaction of a part of the amount due on said mortgage, to wit, the sum of \$500, which was still due the plaintiff as such assignee.

The defendants *Johnson* and *Hurley* filed separate answers, which are here omitted, as the issues thereby raised did not come to trial.

On the trial the plaintiff offered evidence to maintain the issue on his part, but the defendants objected, and moved the court to dismiss the complaint for the following reasons:

1. The complaint does not show a cause of action in the plaintiff individually, but if at all, in a representative capacity, while the action is brought in his individual capacity.
2. It does not show that the time of redemption had expired, while no action will lie at law by a mortgagee or his assigns not in possession of the mortgaged premises, for an injury thereto before the right of redemption has been extinguished.
3. It does not show that the assignors or creditors have sustained any damage or injury.
4. It does not show that the defendants intended to injure either the creditors or the assignors.
5. An assignee cannot maintain an action on the case

for injury to property, which injury was committed with intent to defraud the assignee. 6. An assignee cannot maintain an action on the case for injury to trust property.

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v.

The court ruled that the complaint did not state facts sufficient to constitute a cause of action, and granted the motion to dismiss, from which decision the plaintiff appealed.

COSTIGAN et al.

Enos & Hall, for appellant :

1. The action was properly commenced in the name of the appellant. At common law a trustee could maintain an action for an injury to the trust property (1 Chitty on Pl., 2, 3 and 60), and our statute has not changed the rule. Sec. 14, chap. 122, R. S.; *People vs. Norton*, 5 Seld., 176; Howard's Code, 183-4; *Lewis vs. Graham*, 4 Abb., 106. 2. The complaint shows a cause of action. Though the law regards the mortgagor in possession as the owner of the mortgaged premises, yet equity will restrain him from committing any act which would impair the security. In those states where the courts have no separate equity powers, the action of *quare clausum fregit* has been sustained by the mortgagee against the mortgagor in possession, for waste. 4 Kent, 161; *Smith vs. Goodwin*, 2 Greenl., 173; *Stowell vs. Pike*, id., 387. The law will give a remedy for any injury which it would have restrained. "Where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded." 2 Black. Comm., 23. In all cases where a person sustains a loss or damage by the act of another, an action on the case lies, at the suit of the party injured, to repair the damage. 1 Com. Dig., 178. Counsel cited in support of the complaint, *Yates vs. Joyce*, 11 John., 136; *Lane vs. Hitchcock*, 14 id., 213; *Gardner vs. Heartt*, 3 Denio, 234; *Van Pelt vs. McGraw*, 4 Coms., 110.

Gill, Barber & Fribert, for respondents :

1. The owner of a mortgage cannot maintain an action for an injury to the mortgaged premises, before entry or before the time for redemption has expired, which, in this state, is not until sale. *Wood vs. Trask*, 7 Wis., 572. His only remedy is by injunction. *Cooper vs. Davis*, 15 Conn., 556; 1 Pow. Mort., 156, note a; 4 Kent's Comm., 155; 2 Swift's Dig., 155, 157, 172; *Wakeman vs. Banks*, 2 Conn., 446, 600;

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Leonard vs. Bosworth, 4 id., 421; *Toby vs. Reed*, 9 id., 216; *Peterson vs. Clark*, 15 John., 205. Counsel controverted the doctrine of *Van Pelt vs. McGraw*, *supra*, and a dictum to the same effect, in 3 Denio, 232, as inconsistent with the nature of the mortgagee's interest in the mortgaged premises, as to which they cited *Kelly vs. Burnham*, 9 N. H., 20; 4 Kent's Comm., 155; *Aymar vs. Bill*, 5 Johns. Ch. R., 570; *Ballard vs. Carter*, 5 Pick., 112; *Smith vs. Dyer*, 16 Mass., 18; *Scott vs. McFarland*, 13 id., 309; *Runyan vs. Mersereau*, 11 John., 534; *Wood vs. Trask*, *supra*; *New London vs. Sutton*, 2 N. H., 401; *Smith vs. Manning*, 9 Mass., 422; *Coles vs. Coles*, 15 John., 319. The mortgagor could recover for such an injury, and his recovery would be no bar to an action by the owner of the mortgage, and thus the defendant would have to respond to two different parties for the same injury. Counsel further argued that the admission in the New York cases referred to, that the action would not lie, unless the defendant had done the injury *with intent to defraud* the owner of the mortgage, was, in effect, an admission that such owner had no rights in the land, an infringement of which could be redressed by action. 2. The complaint is bad, because it does not allege that the defendants intended to injure or defraud the owners of the mortgage, or the parties who had a beneficial interest therein. 3. The authorities relied on by the plaintiff's counsel treat the injury to the owner of the mortgage as a mere personal tort, and the right of action therefor was not assignable. *Comegys vs. Vasse*, 1 Peters, 193; *Shoemaker vs. Keely*, 2 Dall., 218; 1 S. & R., 19; 1 Wash., C. C., 13; 3 Kern., 322. 4. The action should have been brought by the plaintiff as trustee, and not in his own name.

November 19. *By the Court*, PAINE, J. The question presented in this case is, whether the owner of a mortgage upon land, who has obtained a judgment of foreclosure and sale, can maintain an action for an injury committed upon the premises before the sale, which impairs the security and prevents the full amount of the debt from being realized, the mortgagor being insolvent, and which was committed wrongfully and fraudulently, with the intent to injure the holder of the mort-

gage. Such is substantially the case made by the complaint, and the court below dismissed it as not stating facts sufficient to constitute a cause of action.

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It was contended, with much ingenuity, by the counsel for the respondent, that the action is not maintainable. And his conclusion was based upon what he claimed to be the result of the American authorities, that is, that a mortgagee has no interest in the land, and therefore cannot support an action for an injury to it. But we think this is making an extreme application of the doctrine alluded to, and one which ought not to be sustained.

It may be conceded that the mortgagor is the owner of the fee, and the mortgagee has only a lien or incumbrance on the land. In progressing from the common law rule, that the mortgagee was the owner of the legal title, and the mortgagor had only an equitable interest remaining, to the equitable rule, that the mortgagor is to be considered as the owner and the mortgagee as having a mere security, there has been much confusion and uncertainty as to the precise character of the interests of both. But it will be observed that these questions have generally arisen in settling other collateral questions arising out of the existence of the mortgage, such as the descent of the legal title, rights of dower, or rights of execution creditors against the mortgagor or mortgagee. And the conclusion which has been arrived at, that the mortgagor is to be regarded as the owner of the land, has not been based upon any diminution of the rights of the mortgagee, but upon the assumption that this conclusion was entirely consistent with the preservation of all his rights, according to the real intent of the contract, which was merely that he should have a security upon the land for his debt. When, therefore, it is said that the mortgagee has no interest — in the land, this general language must be held to mean that the mortgagor is considered for most purposes as the owner, subject, however, to the right of the mortgagee to preserve and enforce his lien. And this right seems to us all that should be required to sustain this action.

For it is the boast of the law that there is no right without a remedy. And for the purpose of practically carrying out

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this maxim, the action on the case at common law was devised and held in reserve, to redress those wrongs which did not find a remedy in any of the established forms of action. The right here is conceded. The mortgagee has a valid incumbrance on the land, which gives him the legal right to subject it to the payment of his debt. The wrong must also be conceded for the purposes of the case. For it is alleged that the defendants fraudulently and wrongfully, and with intent to injure the plaintiff, diminished the value of the land by removing buildings and destroying trees, so that the plaintiff was prevented from subjecting the whole land, and all its value, to the payment of his debt, as he had a legal right to do. Now if there is no remedy for this, the law boasts of what it does not perform. The right is clear, and is a legal right. The wrong is palpable—but there is no redress. If there was any thing in the nature of the case that made such redress impracticable, of course that would be a good answer, for the law neither requires nor undertakes to perform impossibilities. But when the facts present what would have been properly the subject of an action on the case, and the redress is entirely practicable in such an action, we think that justice ought not to fail by an extreme application of the doctrine relative to the rights of a mortgagee, which was established to reduce him to the position of an incumbrancer, but was not designed to deprive him of protection as such.

Regarding this action in this light, the substance of the injury is the destruction or impairing of the security. Sustaining it is, therefore, not at all inconsistent with the cases which hold that the mortgagee, not having the right of possession, cannot maintain an action for a trespass on the land. A trespass might be committed, and a considerable injury caused, and yet the security remain unimpaired. The argument of the counsel would hold good as to such an action. Because the fact might be admitted, and it would not follow that any right of the mortgagee had been injured. But when it appears that the injury is such as lessens the security and renders it inadequate, then it does appear that he is injured, and unless he can maintain an action, his in-

terest may be wantonly or maliciously destroyed with impunity.

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For it is no answer to say that he may resort to an injunction; it being conceded that courts of equity would restrain the commission of such waste as impairing the security. For it is obvious that it might in many cases be committed without the party's knowledge. And the very fact that courts of equity will interfere in such cases to prevent the injury, seems to sustain the right of action for it after it is committed. For it is difficult to comprehend any reasoning by which the interference in the one case could be justified, which would not at the same time sustain the right of action in the other. Counsel seemed to feel the difficulty of this position, and attempted to explain the action of courts of equity, by saying that they enjoined the waste, not because the mortgagee had any legal right in the land which was injured by it, but because it was a violation of good faith on the part of the mortgagor. But surely courts of equity do not interfere to enforce the observance of good faith, where no rights are to be interfered with by its violation. And their interference at all can be justified only on the assumption that the mortgagee has an interest which is entitled to protection, and is injured by such a destruction of the value of the property, as leaves it an inadequate security. And it would seem a most inexplicable anomaly for the law to say to him through one of its tribunals, that if he could ascertain before hand that such an injury was contemplated, it would protect him by the extraordinary remedy of injunction; and yet when it was inflicted before he became aware of the intention to commit it, to tell him through another tribunal, that he had no right which had been violated, and was entitled to no redress. We think, therefore, upon principle, that the action should be sustained.

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And the authorities justify the same conclusion. It is conceded by the counsel for the respondent, that it is supported by the following: *Van Pelt vs. McGraw*, 4 Coms, 111; *Gardner vs. Heartt*, 3 Denio, 102. The principle on which the action rests, is also established in *Yates vs. Joyce*, 11 John., 136, which was an action by a judgment creditor for

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an injury to real estate on which the judgment was a lien, the debtor being insolvent, and the defendant having committed the injury wrongfully, with a view to impair the plaintiff's security. The same doctrine is also approved in *Lane vs. Hitchcock*, 14 John., 213. See also *Smith vs. Moore*, 11 N. H., 55.

These cases not only fully sustain this action, but their reasoning, particularly that in *Van Pelt vs. McGraw*, furnishes a satisfactory answer to the cases most strongly relied on by the respondent. The same remarks there made in regard to *Peterson vs. Clark*, 15 John., 205, are applicable to *Cooper vs. Davis*, 15 Conn., 556. That was an action where the title to mill-stones was involved, which had been severed from the premises and sold by the mortgagor while in possession. The case turned upon the title to the mill-stones, and the question whether an action like the present could be sustained, was not involved. The language of the court relied on, relates to the action for waste, as known at the common law, for an injury to the property, without reference to the question whether the security was injured.

The right of action seems entirely clear, where the injury is committed by a mere trespasser. It is not at all impeached by the fact that the mortgagor might also sustain an action for the same injury. It is frequently the case that different persons, having different interests in property, have each a right of action for an injury to it, each recovering the damage to his own interest. The only difficulty that could arise, would be where the injury is committed by the mortgagor, or under his direction. He being the owner, and having the right to treat the property for all purposes as his own, subject, however, to the rights of the mortgagee, the difficulty would be to define precisely what acts should render him, or those acting under his authority, liable to an action. But we think that *Van Pelt vs. McGraw* establishes the true rule, and that where an injury is committed by the mortgagor, or others acting by his direction, knowing his insolvency, and the existence of the security, and knowing that the act complained of will impair it, the action should be sustained.

The objection that the appellant cannot maintain the ac-

tion as trustee, for the reason that it was a tort, and the right of action therefor could not be assigned, is not valid. If the injury had been committed before the assignment, then it would be good; but here it was committed after the assignment, and the assignee, holding the title for the benefit of all the parties for whom it was made, is the proper plaintiff.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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JOINT SCHOOL DISTRICT No. 7, &c., vs. WOLFE and others.

The power conferred by law upon the state superintendent of public instruction, to examine and decide appeals from the decisions of school district meetings, or from the decisions of town superintendents, in forming or altering, or refusing to form or alter, school districts, is a *quasi* judicial power, which cannot be delegated to the assistant state superintendent.

Where the assistant state superintendent decided, upon such an appeal, that certain portions of a joint school district should be detached and erected into a new district, which should be the legal successor of said original joint district, but provided that said new district should pay to the other portions of said original district, a certain sum of money, and that the decision should be null and void, except upon the making of said payment: *Held*, that even if the decision were valid, such new district was not entitled to possession of the school house which had belonged to the original joint district, until *actual payment* of the sum so directed to be paid.

ERROR to the Circuit Court for *Dane* County.

This action was brought by *Joint School District No. 7*, of Burke, Blooming Grove, Cottage Grove and Sun Prairie, to recover damages for an injury done by the defendants to a school house in said district, and to perpetually enjoin the defendants from removing said school house, as it was alleged they had threatened to do while the school was in session therein. The rights of the parties turned upon the validity and effect of a decision made by the assistant superintendent of public instruction, which was in substance as follows: "In the matter of the appeal of *Abram Wolfe* and others, of Joint District No. 7, of Burke, Blooming Grove,

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Cottage Grove and Sun Prairie, &c., against the act of the superintendents of said towns in refusing to divide said joint district. * * * It is therefore decided that the appeal be sustained, and that section 1 and the east half of 2 in the town of Blooming Grove, and section 36 and east half of 35 in the town of Burke, shall hereafter constitute one joint district, to be known as Joint School District No. 7, of Burke and Blooming Grove; said joint district to be the legal heir and successor of Joint District No. 7, of Burke, Blooming Grove, Sun Prairie and Cottage Grove, liable for its past debts, entitled to its credits, &c. *Provided*, and this decision shall be null and void except upon the performance of the acts herein required, that the said Joint District No. 7, of Burke and Blooming Grove, shall pay to the district comprising the north half of section 6, in Cottage Grove, and section 31, in Sun Prairie, or the districts to which those tracts may be severally attached, such sums of money as shall be found from the assessment roll, &c., to be duly proportioned to the tax contributed by them to the building of the school house in said former school district." In pursuance of this decision, a meeting of the legal voters of the territory designated as forming Joint School District No. 7, of Burke and Blooming Grove, was duly called, a director, treasurer and clerk elected, and a resolution or order passed "that the sum of \$54 68 be raised by tax for the purpose of paying to the district comprising the north half of section 6 in Cottage Grove, and section 31 in Sun Prairie, or to the districts to which they may severally be attached, such sums of money as shall be found, from the assessment roll, to be duly proportioned to the tax contributed by those parts of the district, as formerly constituted, to building the school house in said former joint district," and also a resolution "that the district board are required to locate a school house site, &c., and to remove on to said location the new school house lately built, and which, by the decision of the state superintendent, belongs to this district," &c. In pursuance of this last resolution, the defendants (who were the board of directors elected for said new district, and their employees) took steps to commence the re-

removal of said school house, which were the acts complained of

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The circuit court assessed the plaintiffs' damages at \$100, and granted an injunction according to the prayer of the complaint.

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Allen, Gregory, Pinney & Flower, for plaintiffs in error.

Hopkins & Johnson, for defendant in error.

By the Court. COLE, J. We have very great doubt about the right of the assistant state superintendent of public instruction to examine and determine appeals from the decisions of the town superintendents in forming or altering, or in refusing to form or alter, school districts. The statute authorizes the state superintendent to appoint an assistant superintendent of public instruction, and declares that such assistant shall perform such duties as his principal shall prescribe, not inconsistent with law. Sec. 72, chap. 10, R. S., 1858. It also makes it the duty of the state superintendent, to examine and determine all appeals duly made to him from the decision of any school district meeting, or from the decision of any town superintendent, in forming or altering, or in refusing to form or alter, any school district, or concerning any other matter under the common school law of the state; and his decision thereon is final (sec. 65). Controversies growing out of the formation of school districts, frequently gave rise to questions of considerable difficulty and importance, and we have but little doubt that the legislature, in conferring upon the state superintendent the power to review and revise the action of the local authorities upon these matters, intended to make this a personal duty, to be discharged by the state superintendent. We can conceive of nothing belonging to his office, which evinces greater personal confidence and trust, than this power to hear and determine these appeals. There are many things connected with the office of state superintendent of public instruction, which can as well be performed by an assistant as by the superintendent himself; but this power to hear and determine these appeals, is a quasi judicial function, and ought to be exercised by the state superintendent in person. We therefore

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think that the order of the assistant state superintendent, bearing date November 30th, 1859, exhibited among the papers in this case, and made in the matter of the appeal of *Abram Wolf* and others, of joint district No. 7, &c., was unauthorized and void.

But, moreover, if we are wrong in supposing that the assistant state superintendent had no right to act upon and determine this appeal, still it is very clear that according to the order made by him, the school house could not be removed until payment of a certain sum had been made to the other parts of the old district. For the order says: "This decision shall be null and void, except upon the performance of the acts herein required; that the said Joint District No. 7, of Burke and Blooming Grove, shall pay or cause to be paid to the district composed of the north half of sec. six, in the town of Cottage Grove, and section thirty-one, in the town of Sun Prairie, or the districts to which these several tracts of land may be severally attached, such sums of money," &c., thus making the validity of the order depend upon the performance of certain things. Now it is not pretended that the conditions have been performed, upon which the validity and operation of the order depended. The most that was done to comply with it, was to rule to raise, by taxation, a certain sum of money, to be paid over to the other parts of the old district. But this was not what the order required. The money was to be paid before the order should take effect. As this was not done, the plaintiffs in error had no right whatever to interfere with the school house, and their attempting to do so when the school was in session, presented a very proper case for an injunction.

Several questions of practice were raised and discussed upon the briefs of counsel, but it appears to us unnecessary to notice them, after expressing ourselves upon the merits as distinctly as we have. We certainly think the order upon which the plaintiffs in error relied to justify them in removing the school house, was of no validity in the first instance; and even if it were a valid order, the parties acting under it, did not perform the conditions precedent, upon the perform-

ance of which the same was to take effect, and go into operation.

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The judgment of the circuit court is affirmed.

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ANDERSON and another vs. MORRIS.

Where, in an action against a vessel for seaman's wages, before a justice of the peace, the complaint, which was in writing and signed by the plaintiff, was verified only by the following *jurat* added thereto: "Subscribed and sworn before me, this, &c.," signed by the justice before whom said suit was brought, and the master of the vessel appeared and admitted a certain sum to be due the plaintiff, for which judgment was accordingly rendered: *Held*, that if there was a defect in the verification of the complaint, which would otherwise have been fatal, it was cured by the master's appearing and going to trial, without objection to the complaint.

ERROR to the Circuit Court for *Racine* County.

Anderson and *Edwards* sued *Morris* for negligence in allowing the schooner *Amelia* to be removed from his county, after he had lawfully taken possession of it, as sheriff, under certain legal proceedings, instituted by them against one *Carswell*, to recover possession of said vessel. On the trial, the plaintiffs, for the purpose of showing their title to the vessel, offered in evidence the following entry in the docket of a justice of the peace: "Henry Taylor vs. Schooner *Amelia*. Before J. H. Hinds, Justice, 1857, September 18. An affidavit of plaintiff taken and filed, and warrant issued against the schooner *Amelia*; warrant returned same day by deputy marshal Roberts; schooner *Amelia* attached and in his custody; Robert Tapling, the master of said schooner, appeared for the vessel. The plaintiff offered the order of the master in evidence. The master admits that there is due the plaintiff for wages \$29 35. Judgment is, therefore, rendered against the schooner *Amelia* for \$29 35, with costs, &c. J. H. HINDS, Justice of the Peace." The defendant objected to the evidence, unless it was shown that the justice had jurisdiction. Objection over-

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ruled, the defendant excepting, and the entry read. The plaintiffs then offered in evidence the complaint in said action, which was signed by said Taylor, and to which was appended the following: "Subscribed and sworn before me, this 18th of September, A. D. 1857. J. H. HINDS, Justice Peace;" to which the defendant objected, because it was not verified as required by the statute; and the court sustained the objection, the plaintiffs excepting. Said justice, as a witness for the plaintiffs, testified that Robert Tapling acted as master and captain of the schooner *Amelia*, and that on the trial of the case of *Taylor vs. Schooner Amelia*, he appeared on behalf of the vessel, and admitted that the amount for which judgment was rendered was due to the plaintiff; and that he also appeared in behalf of said vessel in four other cases in which suit was brought before him against her, and made a like admission in each case. The plaintiffs offered in evidence entries upon said docket, of the proceedings and judgments in said four cases, which were of the 9th and 10th of November, 1857. The same objections were made to the complaints in said cases, as to the complaint in the case of *Taylor vs. Schooner Amelia*, and the same ruling made and exception taken. Another witness also testified that said Tapling was master of the schooner *Amelia* in September, October and November, 1857.

The plaintiffs offered to prove that said vessel was sold under orders of sale, issued upon said judgments; and that they had bought the vessel from the purchaser at such sale, and also offered in evidence the record of their suit against *Carswell*, but the court excluded the evidence as immaterial, on the ground that the justice had no jurisdiction to render said judgments. The jury, under direction of the court, found a verdict for the defendant. Judgment on the verdict.

Paine & Millet, for plaintiffs in error, contended that the alleged irregularity in the verification of the complaint, did not affect the jurisdiction of the justice (R. S., 1849, chap. 116; 16 Wend., 36; *Hilliard vs. Austin*, 17 Barb., 141; *Foster vs. Hazen*, 12 id., 547; *Rector vs. Drury*, 4 Chand., 24); and that the defects were waived by the master's appearing and answering to the merits. Sec. 7, chap. 116, R. S., 1849;

2 Hill, 517, 657; 5 id., 120; 6 id., 44; 2 Pick., 591; 15 Ohio, 433. June Term,
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Strong & Fuller, for defendant in error, contended that the complaint was not verified by affidavit, as required by statute (R. S., chap. 150, sec. 4; chap. 125, sec. 19); that the verification should be essentially in the language of the statute (12 How. Pr. R., 64; 11 id., 374); that this being a special proceeding *in rem*, and giving the justice summary jurisdiction to a far larger amount than he has in other cases, and being intended to convey title, the jurisdictional defects could not be cured, and the rights of mortgagees, or others interested in the vessel, barred, by the master's appearing in the case, unless the statute was strictly complied with; and that the justice had no jurisdiction over the vessel. 5 Wis., 91. ANDERSON et al.
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By the Court, COLE, J. The principal objection taken to the complaint in the case of *Taylor vs. Schooner Amelia*, is, that the same was not properly verified. Sec. 4, chap. 116, R. S., 1849, declares that the complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued. It shall be verified by the affidavit of the plaintiff, or some credible person or persons for him, and shall stand in lieu of a declaration. In the present case the complaint was signed "Henry Taylor," and a *jurat* was added in this form: "Subscribed and sworn before me, this 18th day of September, A. D., 1857. J. H. HINDS, Justice Peace." Now assuming that the complaint was not "verified by affidavit" in the manner required by the statute, still we think this irregularity was cured by the master's appearing in the action and going to trial on the merits. Sec. 7 provides that the master, owner, agent or consignee of the boat or vessel, may appear on behalf of such boat or vessel and plead to the action. The master, then, was fully authorized to appear for the boat, and if the complaint was not properly verified, he should have taken an objection to it on that ground, instead of proceeding to trial. Having proceeded to trial, the defect in the complaint—if there was one—must be deemed to have been waived. *Ilsley vs. Harris*, 10 Wis., 95; *Bromley vs.* November 19.

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Smith, 2 Hill, 517; *Malone vs. Clark*, id., 658; *Swartwout vs. Roddis*, 5 Hill, 118; *Koon vs. Mazuzan*, 6 id., 44; *Lamoure vs. Caryl*, 4 Denio, 370.

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The circuit court, therefore, improperly excluded the complaint offered in evidence. The irregularity in the complaint did not render it void. It contained all the necessary allegations to give the justice jurisdiction, and was sworn to, but not verified by a technical affidavit. It undoubtedly came within the spirit of the statute, if not within the letter, and the defect was cured by the master's appearing and going to trial.

The judgment of the circuit court is reversed, and a new trial ordered.

RICHARDS and others vs. THE GLOBE BANK.

A judgment was entered upon a note, under a warrant of attorney, which was a separate instrument, but upon the same sheet of paper as the note, and described the note correctly, except that it referred to the same as bearing even date with the warrant, while the warrant itself (which was filled up from a printed blank), was *without a date*: *Held*, that the judgment ought not to be vacated on the ground that the warrant did not sufficiently identify said note as the one on which judgment was authorized to be entered, it appearing that said note was the one intended to be described in the warrant.

A note made in this state, payable in New York, with interest at a rate allowed by the laws of this state, but not by those of New York, is not usurious, when the contract is made in good faith and not for the purpose of avoiding the usury laws.

Where a note made in this state by residents thereof, payable in New York, with interest at 10 per cent., was negotiated for money to be used in this state, and was purchased by a bank in this state, and sold by it in New York, and A, one of the makers of said note, when it was about maturing, made an arrangement in New York, with the president of said bank, (both being temporarily in that city), in pursuance of which the other makers of said note executed in this state, to said bank, a new note for the same amount, with interest at the same rate, payable also in New York, and the bank thereupon forwarded said new note to New York to be signed by A, (who accordingly signed it in that city), and also forwarded its draft on New York to take up the old note, charging the makers of said note the current rate of exchange on said draft: *Held*, that the new note thus given was governed by the law of this state, and was not usurious because it provided for the payment of a higher rate of interest than was allowed by the law of New York.

Held, also, that inasmuch as said bank had ceased to be the owner of the first note, its charge of exchange upon the draft which was used to take up the same, did not render the transaction usurious.

APPEAL from the Circuit Court for *Milwaukee* County. June Term,
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This was an action by *Richards, Smith, Garret Vliet*, and *Jasper Vliet*, to vacate a judgment entered against them in the circuit court for Milwaukee county, on the 10th of October, 1857, in favor of the Globe Bank. The following is the statement of the *facts*, as found by the judge of the circuit court: "First. The judgment complained of was for \$5,000 and costs, and was entered upon a warrant of attorney to confess judgment. The note for the amount of which it was entered, is dated on the 7th of August, 1857, at Milwaukee, Wis., where it was actually executed by *Richards* and the two *Vliets*. It was delivered to the defendant at Milwaukee, Wis., by one Mason, the agent of the plaintiffs, executed as aforesaid, and then forwarded to New York (where it was made payable at the office of Wm. J. Bell & Co.) for the signature of *Smith*. The warrant of attorney which accompanied said note, was executed and delivered in precisely the same manner, and contains a correct description of said note—referring, however, to it as being of even date therewith, when its date is left blank, the same never having been filled up. They are both on the same piece of paper, but in different instruments, and are mostly printed blanks, the note for which judgment was confessed being the one intended to be described in the said warrant of attorney.

Second. The pleadings and testimony, I think, establish the following facts as to the origin of this note: The plaintiffs were the directors of the Milwaukee & Horicon Railroad Company, a Wisconsin corporation, operating a railroad extending from Milwaukee into the interior of the state. The plaintiff *Smith* was the president. The defendant is a banking institution, organized under the banking law of this state, and having its place of business in this city. On the 10th day of June, 1857, the plaintiffs made their promissory note for the same amount as the one in question, payable at the same place, to the order of said *Smith*, in sixty days. They negotiated it to one Clark, who sold it to one Asahel Finch, and from him the defendant purchased it. The bank sold it to W. J. Bell & Co., of New York, and at the time it was

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about maturing, Bell & Co. had pledged it as collateral in some bank in that city.

When the note was about falling due, *Smith*, and *Finch* who was president of the bank, entered into an arrangement in the city of New York, where they both were at the time, by which the defendant was to take up the note, and the plaintiffs were to execute a new note for the same amount, and payable at the same place, together with a warrant of attorney to confess judgment thereon in case of non-payment. This was actually carried out, when *Finch* returned to Milwaukee shortly afterwards, by giving the note and warrant of attorney upon which the judgment complained of has been confessed. The bank discounted the new note as follows: Both note and warrant of attorney were delivered to defendant by said *Mason*, as the agent of the plaintiffs, at Milwaukee. They were executed when so delivered, by *Richards* and the two *Vliets*. The defendant then forwarded it to Wm. J. Bell, New York City, for the signature of *Smith*, together with a draft with which to take up the old note. The draft was then applied to the payment of the old note, which was cancelled and delivered to *Smith*, who, at the same time, signed the new one. The bank required and took current exchange on New York upon the draft, besides interest on the note at the rate of 10 per cent. per annum. That rate is allowed by the law of Wisconsin, in favor of banks, while the rate of interest in New York is 7 per cent. per annum, and contracts for a higher rate are declared to be void.

Third. The money raised upon these notes by the plaintiffs was for the use of the Horicon Railroad Company, and was actually used by that company about its business in Wisconsin. All the plaintiffs were citizens and residents of this state, where they were all domiciled at the time of these transactions, and the same is the case with *Mason* and *Finch*. *Smith*, at the time, had been several months in New York engaged in the business of the Horicon Railroad Company, but had not lost his residence here. As soon as *Smith* had executed the note, it was returned to the bank.

Fourth. I think the letters and monthly statements of Wm. J. Bell & Co. to the bank, taken in connection with the

books of the bank, and the testimony of Mr. Finch, show that neither the bank nor Finch owned the first note, but they had really disposed of it. The bank had therefore a legal right to receive exchange upon the draft. The note was beyond their control, and they could not renew it. They could only procure it by paying it, which they did with the draft."

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Upon these facts, the court found, as conclusions of law: 1. That the warrant of attorney was valid, notwithstanding the omission of the date thereof, and that the note on which judgment had been confessed, was sufficiently identified as the one therein described. 2. That a contract made *bona fide* in Wisconsin, but to be performed in New York, and stipulating for a rate of interest allowed by the law of this state, but not by that of New York, "is not usurious here or elsewhere, and ought to be enforced solely with reference to our law as to usury;" "that the laws of this state were the only laws to which reference was had" in the making of the note in question, "and are now the only laws which can apply;" and that the note was, therefore, not usurious. To these conclusions of law the plaintiffs excepted.

Judgment for the defendant.

S. Park Coon and *H. F. Prentiss*, for appellants:

1. The note was usurious and void by the law of New York. Story on Conflict of Laws, §§ 298 *et seq.*; *Smith vs. Smith*, 2 John., 235; *Thompson vs. Vulchan*, id., 255; *Hicks vs. Brown*, 12 id., 142; *Ludlow vs. Van Rensselaer*, 1 id., 94; *Jacks vs. Nichols*, 5 Barb., 88; *Hyde vs. Goodnow*, 3 Coms., 266; *Commonwealth vs. Bassford*, 6 Hill, 575; 3 Wheat, 184; 13 Peters, 65. 2. The warrant of attorney was void for uncertainty. *Man. Bank vs. St. John*, 5 Hill, 497; *Gee vs. Lane*, 15 East, 592; *Dilley vs. Van Wie*, 6 Wis., 212. 3. The contract is one which the bank had no corporate power to make. *Bank of Chilicthe vs. Swayne*, 8 Ohio, 257, and cases there cited.

Finches, *Lynde & Miller*, and *O. H. Waldo*, for respondent.

1. The warrant of attorney was sufficient to authorize the entry of the judgment. *Lee vs. Mass. Fire Ins. Co.*, 6 Mass., 208; *Harrison vs. Trustees of Phillips Academy*, 12 id., 456;

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Rapley vs. Price, 4 Eng. (Ark.), 428; 6 Wis., 80. 2. The law of Wisconsin must govern the contract in determining the question of usury. *Depau vs. Humphreys*, 20 Martin (8 N. S.), 1; *Chapman vs. Robertson*, 6 Paige, 627, 634; *Peck vs. Mayo*, 14 Vt., 33; *Atwater vs. Rælofson*, 4 Am. Law Reg., 549; 2 Parsons on Cont., 94; *Fisher vs. Otis*, 3 Chand., 101-2; *Harvey vs. Archbold*, 21 E. C. L., 412; *Fitch vs. Remer*—opinion by Judge McLEAN in U. S. circuit court, not yet published.

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By the Court, COLE, J. We fully concur in the views expressed by the circuit court upon the evidence in this case, and as to what facts are established by it. We also think the conclusions of law drawn from these facts are correct and sound legal propositions. The objection taken to the warrant of attorney, that it was not such an instrument as is contemplated by the statute to authorize an entry of judgment upon, appears to us entirely untenable. The warrant of attorney recites: "That whereas the subscribers are justly indebted to the *Globe Bank*, upon a certain promissory note, bearing even date herewith, payable sixty days after date thereof, to said bank or order, at the office of Wm. J. Bell & Co., in New York, the sum of five thousand dollars, with interest after due at the rate of ten per cent. per annum until paid. Now therefore," &c., making and appointing, in the usual manner, an attorney to appear and confess judgment in favor of the bank or its assigns, upon the note. Now the particular defect ascribed to this warrant of attorney is, that it describes the note upon which judgment was to be entered, as one "bearing even date herewith," while, in fact, the warrant of attorney was not dated at all. It appears that the warrant of attorney was a printed blank, and, undoubtedly through inadvertence, the date was not filled in when the instrument was executed. The warrant of attorney and the note were upon the same piece of paper, though in different instruments, and were mostly printed blanks. The note was properly dated, and there could be no doubt in respect to the note intended to accompany the warrant of attorney, and upon which the judgment was to be entered.

And although the date was thus omitted from the warrant of attorney, we do not think we should be authorized in declaring it void for that reason. Our statute requires that the authority for confessing a judgment shall be in some proper instrument distinct from that containing the bond or contract, and we can but think that the authority in this case was a sufficient warrant of attorney in all respects. Sec. 13, chap. 102, R. S., 1849.

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Neither do we think there is any ground for saying there was usury in the note in question. The note was dated at Milwaukee, and made payable in New York city, with interest after due at the rate of ten per cent. per annum. The makers of the note were directors of the Milwaukee & Horicon R. R. Co., a corporation of this state, and were citizens of this state, and executed the note here, except *Smith*, who executed the same in New York city, being temporarily absent there on business of the company. The railroad, for whose use and benefit the loan was made, was a corporation organized under the laws of Wisconsin, having its principal office in Milwaukee, and operating its road here. The money was obtained of the bank in Milwaukee, also a corporation of this state, and, although the note was made payable in New York, at a rate of interest exceeding the legal rate of that state, still it was no more than the bank was authorized to contract for by the laws of this state, and hence would repel all presumption that the parties resorted to this expedient to avoid our laws upon usury. Had the note been made payable in Wisconsin, or generally, there would have been no ground for saying that it was usurious. It would have been a valid contract, and one which the courts of this state would have enforced. The interest agreed to be paid was the legal and ordinary rate charged by our banks on discounting paper and making loans. Why then should not the contract be governed by the laws of this state, instead of the usury laws of New York? Is there any reason for saying that the parties contracted with reference to the laws of another state, and not this? We can see none. Does the circumstance that the note was made payable in New York, render it a New York contract, to be governed by the laws

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of that state in respect to usury? Upon this point, the authorities cited by the counsel for the respondent, are too clear and emphatic to leave room for doubt. They certainly establish the proposition, that if the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though that rate be higher than is lawful by the law of the place where payment is to be made, still the contract will be valid and binding. *Depau vs. Humphreys*, 4 Cond. La. R., 403; *Chapman vs. Robertson*, 6 Paige, 627; *Pratt vs. Adams*, 7 id., 615; 2 Kent's Com., p. 460; *Pecks vs. Mayo*, 14 Vt., 33; *Fisher vs. Otis*, 3 Chandler, 83; *Atwater vs. Rælofson*, 4 American Law Reg., 550. See also a recent opinion of this court, *Newman vs. Kershaw*, where this question is quite fully discussed. "The general doctrine is," says Chancellor KENT, "that the law of the place where the contract is made, is to determine the rate of interest where the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on land in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest." The rule thus laid down is adopted in *Newman vs. Kershaw*. We therefore think that under the facts of this case, the contract must be considered as a contract of this state, and that our laws are to control its validity in respect to the interest, though made payable in New York, where the rate of interest is less.

It follows, from these views, that the judgment of the circuit court, dismissing the appellants' complaint, must be affirmed.

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APPEAL from the Circuit Court for *Milwaukee* County.

This case was reported in 9 Wis., 70. On a motion for a rehearing, which was *denied*, DIXON, C. J. delivered the following dissenting opinion:

Per DIXON, C. J. As I dissented from the judgment pronounced in this case, so I dissent from the order denying the appellant's motion for a rehearing. I am unwilling that anything should transpire, from which my assent to either the judgment or order should be inferred, and having some reasons which I am anxious to urge against both, I avail myself of the opportunity thus afforded for that purpose. On the former occasion (9 Wis., 87), I confined my remarks almost entirely to the *words* of the statute, endeavoring to show therefrom that the construction given by the majority of the court was false and erroneous. At this time it will be my principal purpose to endeavor briefly to show the same thing by applying to the question under consideration, some of those well settled rules and principles of statutory construction, which are so often resorted to by courts to aid in arriving at the true intention of the legislature, and which are founded quite as much upon external facts and circumstances connected with the law as it stood before the passage of the statutes, and of which courts take notice in considering them, as upon the words of the statutes themselves.

The great object in construing statutes is, to ascertain what was the true meaning and intention of those who framed them; and although the words used may be said to be the principal, yet they are not the only means of determining such meaning and intention. Of those rules derived from surrounding facts and circumstances growing out of the previous state of the law, a primary and most important one is, to consider the *mischief* intended to be remedied—the *defect* for which the common law did not provide. This rule involves an inquiry into the law as it was at and before the time when the statute was made. By the common law, an indigent debtor could be compelled, in satisfaction of his debts, to part, not only with the necessary comforts, but with the most meagre means for the support of life. This rigorous and unrelenting system for enforcing obligations, was felt to be a great social and political evil. Beside the misery and suffering which it brought upon the debtor and his family, it was often injurious to society at large, by rendering them not only useless, but sometimes burdensome members

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of it. This was the mischief which had been the subject of complaint, and which the legislature, by the section of the statute under consideration, designed, in part, to remedy; it was the disease of the body politic which they resolved to cure.

Foremost among those things which were considered requisite to the comfort and happiness of the debtor and his family, and to the good order and welfare of society, though, owing to the slow growth of liberal ideas, not always the first to receive legislative care and attention, was a home—a suitable place of residence, with its appurtenances, in which he and they might remain, unmolested by the importunate and pinching demands of his creditors. Accompanying this were the wearing apparel, household furniture, and necessary provisions for himself and his family, his library, the necessary domestic animals, teams, vehicles, and utensils of husbandry; and, to a limited amount, the tools and instruments of labor of the mechanic or artisan, the stock of the tradesman, and the library and implements of the professional man, all of which, together with other needful and proper articles, the legislature, by other sections of the act, has most wisely and beneficently provided for and protected. Beyond depriving debtors of these, there was no complaint. Aside from them, nobody had regarded it as a hardship that property of whatsoever character or description, should be taken and disposed of to satisfy debts which the owners had refused or neglected to pay. Nobody had murmured because stores, warehouses, shops, mills, factories, and all other buildings and structures designed and used for trade, commerce or manufactures, and houses, lands and all articles of personal property, not enumerated in the above specifications, were liable to seizure and forced sale on execution. The payment of debts has always been regarded as a duty of primary obligation, and its enforcement has been the principal object of almost all civil proceedings. The general course of legislation has been to facilitate the means of collection, and advance the remedy, and not to impede or retard them. The legislature did not intend to relieve debtors from the discharge of this duty, or to interfere with the general power to compel its performance. But,

while a rigid and exact compliance with contracts and obligations was esteemed a matter of general public good, to enforce which it behooved the state to furnish its citizens with adequate means and facilities, still, in view of the unfortunate condition of many debtors, and the social and political evils which it engendered, it was considered better for society at large to withdraw from creditors so much of that coercive power which had theretofore remained in their hands, as was requisite to enable debtors, if they chose, by retaining these necessary comforts, to ameliorate their condition and relieve the public of an unwelcome burden. Individual happiness and popular welfare demanded this much, but they demanded no more. The legislature, if they went beyond this, committed a positive wrong, which no man, however blunted his moral faculties may be, if he has any, can fail to perceive. If they went beyond this, they exceeded their lawful powers, and disregarded that paramount obligation which rests upon every state, to provide reasonable and proper means, by which the rights of each individual may be preserved and protected, and his wrongs relieved and redressed. They overreached and violated the mandate of the constitution itself, which declares, as a fundamental right, that "every person is entitled to a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Sec. 9, Art. I. They overstepped both the letter and spirit of its requirement, that "the privilege of the debtor to enjoy the *necessary comforts of life*, shall be recognized by *wholesome laws*, exempting a *reasonable* amount of property from seizure or sale for the payment of any debt or liability hereafter contracted."

I say that if the effect given to the act in this case be that which the legislature intended it should have, *then* have the legislature done or attempted to do all these things, and the statute is to that extent unconstitutional and void, and ought to be so declared by this court. For if the defendant in this case can be thus permitted to withdraw from the reach of his

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creditors so large and valuable a proportion of his property, which does *not* pertain to "the necessary comforts of life," then no man has "a certain remedy in the laws, for" any "injuries or wrongs which he he may receive in his person, property, or character." It is denied to the present plaintiff, and, if the same rule is to prevail, it must inevitably be denied to very many others. If the legislature can take away the remedy to this unjustifiable and alarming extent, they can destroy it entirely, and thus this solemn constitutional declaration of the people becomes a dead letter, a mere "glittering generality," without substance or effect. Under such a construction the statute becomes, in many cases, a plenary and positive denial of the latter clause of the same section of the constitution. It denies justice. It withholds it as freely, completely and promptly, as the constitution declares it shall be obtained. It is radically repugnant to the requirement of the constitution, that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale:" 1st. Because it leaves unwilling debtors in the enjoyment of property which is *not of the necessary comforts of life*. 2d. Because it is *not a wholesome law*. And 3d. Because the amount of property which it exempts from seizure or sale is *not reasonable*.

A store or other place of business, is not one of "the necessary comforts of life." If it be, then are all things over which man exercises dominion and control, and the expression becomes unmeaning and idle. By it I understand those articles of property which all the inhabitants of a state or community must alike have and use, in order to the moderate enjoyment of life according to their age and sex, and the nature and custom of the country in which they live. Such are those which I have above enumerated, and which the legislature have, by their *language*, pointed out and exempted.

It is an unwholesome law. By enabling faithless debtors to withhold, of their abundance, that which justly belongs to their injured creditors, it breaks down and destroys the sanc-

tity of contracts and obligations, subverts and overthrows the principles of rectitude and integrity, and sanctions and encourages bad faith, fraud and dishonesty. The government that would enact such laws, would look with indifference upon robbery, theft and every kind of larceny or trespass. The one is a violation of private rights by stealth and force; the other, by deception and treachery; and no law can be wholesome which tolerates either.

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The amount of property which it is thus made to exempt, is excessive and unreasonable. This objection is self-evident. It is noticed and admitted in the majority opinion of the court. They say "that the grossest abuses find sanction under its provisions, in many cases every day." It is broadly sustained by the facts of this case. Here property, of the clear value of \$15,000, and the annual value of \$1,500, not pertaining to the necessary comforts of life, not tools, or implements of physical or mental labor, nor articles of trade, and not that whereon or whereby the defendant must exercise his productive skill and industry for the present or future subsistence of himself and his family, is declared to be free from seizure or sale for the satisfaction of his debts. While owning this amount and kind of property, he is told that the payment of his debts and the fulfillment of his contracts with his fellow men is a mere matter of favor, which he may extend to or withhold from them at his pleasure, and that, in case of his refusal, there is no power in the law to compel him. The plaintiff is at the same time told that his remedy for the recovery of a just demand, little exceeding one-fifth part of the value of the property, rests in entreaty only, and that the laws afford him no redress for the defendant's non-compliance. And this is done by affirming a principle which would enable the defendant to hold property of the same kind to many times the same amount and value, without changing his legal position, or that of his creditors. Such a doctrine can never receive my sanction.

In my opinion such laws are prohibited by the foregoing provisions (section 9 and 17 of Article I) of the constitution. These two sections must be construed together, and so that both may stand and accomplish the objects intended. They

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affirm certain fundamental principles by which the action of the government must ever be guided. They assert certain primary rights, which no legislature has the power to abrogate or destroy. By them we see that the attention of the framers was not directed exclusively to either debtors or creditors, as a class, but that they looked to, and guarded the rights and interests of both; and that they did not intend that the one should be legislated for at the expense of doing manifest and gross injustice to the other. Their language is as explicit and positive in the one case as in the other. The section which declares the privilege of the debtor, likewise declares the *extent* of that privilege, and the *kind* of laws by which it shall be recognized. This they were careful to do in order to prevent abuses, and that it might not be made a pretext for defeating the objects of the preceding section by withholding remedies, and disappointing the ends of justice. It is a well established rule of constitutional construction, that every affirmative prescription implies a negative of every thing contrary to, or inconsistent with it; and where the constitution prescribes that "the privilege of the debtor to enjoy *the necessary comforts of life*, shall be recognized by *wholesome laws*, exempting a *reasonable amount of property* from seizure or sale;" such positive directions, by necessary and unavoidable implication, deny to the legislature the power to protect the debtor in the enjoyment of those things which are not "of the necessary comforts of life," or to exempt from seizure or sale, an unreasonable amount of property, as clearly and strongly as if it had in each instance been forbidden by express words. The same may be said of the character of the laws by which the privilege of the debtor is to be recognized. They must not be unwholesome and evil in their nature and tendencies. They must not be a shield for dishonesty and fraud. This rule of construction is so obviously well founded in reason, and so familiar in practice, that it seems unnecessary to cite authorities in its support. If it were, the case of the *State ex rel Crawford vs. Hastings, State Treasurer*, 10 Wis., 530, in which it was discussed and acted upon by this court, and the authorities there cited, are quite sufficient. When limitations

dinate to the people and to the constitution or government, has the power, by act, to defeat the objects for which it was erected, which were to establish justice, promote the general welfare, secure the blessings of liberty, and protect their persons and property from violence and injustice. The constitution, which is composed of the declaration of rights and the form of government established by it, is a compact made by the people among themselves, through the agency of a convention selected by them for that purpose. It is founded on the principle that, the people being the source of power, all government of right originates from them, and is subject to their control and such regulations as they have made by it. In construing it, therefore, we are to look to the purposes for which they entered into it, and be guided, as far as possible, by the motives which led to its formation. Those purposes being as well the foundation of the legislative as of every other power conferred, will not only enable us to decide what are the proper objects of those powers, but will also materially aid us in determining the nature and terms of the compact itself. The ends for which the legislative power was delegated will limit its exercise; and if an act be clearly hostile to them, and contrary to the principles upon which the compact is founded, it cannot be considered a rightful exercise of legislative authority, and will therefore be invalid. That the abolition of remedies and the shutting of the doors of justice against any man, or any class of men, are within the general purposes for which the constitution was formed, will not, I think, be for one moment contended, and it appears to me equally manifest that such authority is not to be gathered from any language used in the instrument itself. To say that that under consideration was used with such intention, is to contend that the people expressly authorized the legislature to frustrate and disappoint one of the principal objects of government, and the main one for which the section itself was introduced, and to leave them, at its pleasure, without the benefits which they intended to derive from it. It is making these words neutralize and counteract the effect of those which precede them, which were designed directly to restrain the legislature from exercising any such

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power, and rendering the entire section unmeaning and useless. The words themselves show that there must be "laws," and the preceding clauses define what in substance and effect those "laws" shall be, and when they were once in force, no legislature could totally repeal them without the contemporaneous passage of others in their place.

It may also be said of section 17, that the legislature are the sole judges of its provisions and of the laws which are to be passed under it, and that it is for them to determine what are the necessary comforts of life, and whether the laws are salutary and healthful, and what is a reasonable amount of property to be exempted from seizure and sale for the payment of debts. But if it be admitted, as upon both principle and authority I think it must, that all positive prescriptions contained in constitutions, statutes and other instruments, imply a negative of everything inconsistent with them, then it seems to me clear that the power and duty of the courts, in proper cases, to construe and give effect to the section, and to see that the will of the people as expressed in it is carried out, and not infringed or defeated by the legislature, is as unquestionable as in any other case of legislative usurpation. For it would be useless for the people to give positive directions upon this or any other subject, and to prescribe the manner in which those directions are to be carried out, thereby limiting the legislative authority, if in any such instance the power of determining finally the extent and meaning of such directions, and the validity of their acts with reference to them, resided solely with the legislature. Such power would defeat and render nugatory all the restrictions and limitations on the authority of the legislature, and the people would be compelled either to submit to the usurpations or to assume the powers of government, whenever its ends were in any manner perverted. It was never intended, upon the passage of an act repugnant to, or in violation of, the constitution, that either course should be pursued—that the people should yield to a despotism, or reduce themselves to anarchy; but the design was, through the agency of the government itself, to provide proper modes for remedying such evils. Hence the separation of the gov-

ernment into distinct branches, and the judicious distribution of legislative, judicial and executive powers, in separate and distinct hands, subjecting the functionaries of each to such limitations and restraints as the people thought fit to prescribe, and obliging them, each in their respective sphere, to perform such duties as are severally assigned to them. Among the highest duties thus imposed upon the judicial branch, is that of determining the validity of all acts of the legislature, with reference to the constitution or fundamental law; and whenever by it the authority of the legislature is either expressly or impliedly limited, the courts cannot avoid the responsibility, in proper cases, of ascertaining and defining what those limits are. If, therefore, in attempting to exempt a certain quantity of land as the homestead, or place of the dwelling house and its appurtenances, or as agricultural land when the owner is a tiller of the soil, the legislature has declared that such land, and everything which the debtor may attach to it, irrespective of its value or character, or the uses to which it may be put, or for which it may be designed, or who may occupy it, and irrespective of its connection with those things which are requisite to the moderate enjoyment of life, or necessary to enable the owner, through the exercise of his trade or business, to gain a livelihood for himself and those who depend upon him, shall, under all circumstances, be exempt, such act as clearly exceeds the authority given by the constitution, as if the legislature had gone outside its requirements by express words, and, naming such property, had said that it should not be subject to seizure or sale; and it would be alike the duty of the courts in either case to declare the act to that extent void. And if, in so doing, the legislature has enacted an unwholesome law, and has suspended the remedy of the creditor, when the people intended he should have one, and has authorized the debtor to retain, of *such* property, an amount or value which is excessive, these are violations of the constitution in other respects, and furnish additional causes for adjudging the act invalid. In such cases the manner of the attempted encroachment is immaterial. It is the substance and effect, and not the form of the act, to which the courts are to look.

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If it had been made to read that property of this character, to the amount or value of \$15,000, should not be liable to seizure or sale, the violation might have been more obvious, but it would have been no more substantial or complete. If the legislature, after having, as it has already done, by the most liberal provisions, secured to the debtor a home and the other comforts of life, and the necessary means with which, by the practice of ordinary industry, to earn them for the future, had said that in addition thereto, he should be entitled to claim and hold as exempt \$15,000 of other property, I do not see how it could be well maintained that such act was not plainly hostile to the spirit and requirements of the constitution. It is equally so now, under the interpretation which it has received. It is said, in the opinion of the majority of the court in this case, that, under the provisions of the act, property of the *kind* contemplated by the constitution, of many times the value of that under consideration, is frequently claimed and held as exempt. If this be so—and there can be little doubt of it—it is no argument to prove that the legislature may exempt that which the constitution excludes. Besides, its limitations, as I have shown, do not extend to the kind of property merely, but they include its amount and value, and both are to be regarded. And it is no answer to an objection as to the *kind* which is exempted, to say that the legislature have, by the same act, exceeded their powers as to its *value*, were it such as it might lawfully protect. Both limitations are equally binding, and an excess of either avoids the act. According to the principles for which I contend, and which are so old and well established that they have become axioms of our law, the courts must determine the extent of the legislative authority under both; and unless they do, they ignore and cut off the authority of these principles, and leave the people subject to greater calamities than an unwise or injudicious application of them would be likely to produce. The task may be a most difficult and delicate one, and require the greatest care and reflection in its performance, but it is no invasion of the province of the legislature and no arbitrary and unphilosophical extension of principles beyond the field of their legitimate application.

There may be some matters which, from necessity, are, under the constitution, left to the discretion of the legislature, and of which they are the sole judges. The exigencies of society in some instances require the investment of such extraordinary powers, but the subjects under consideration do not fall within them. They are expressly taken out. Where such powers are delegated, it undoubtedly rests in the wisdom of the legislature to determine when and how they shall be exercised, and the courts cannot interfere. For a discussion of the doctrine of implied limitations as applicable to statutes, I would refer to the case of *State ex rel. Gill vs. Common Council, &c.*, 9 Wis., page 254.

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From this two-fold or connected view of the mischiefs to be remedied, and the provisions of the constitution which concern them, the true intention of the legislature, I think, becomes more apparent. We thus see, side by side, not only the evils themselves, and the views which the people took of them, but also the nature and extent of the remedy which they intended to provide. It brings to our assistance another rule or maxim of statutory construction, which it is always of the first importance to observe, and which is, that we are never to presume that the legislature would intentionally infringe the provisions of the constitution, or violate the rights of the citizen. Such presumption is only to be overcome by the plain and manifest language of the act; and if the language be susceptible of a construction which is consistent with it, the act must stand; but if not, then it must fall. Where usurpations do take place they are not presumed to occur with deliberation, but are considered as the results of mistake or inattention, or of the dominion of the passions over reason, in times of political struggle. Starting then with this presumption, it is the first object of the courts to reconcile the acts of the legislative body to it, and, failing in this, they are to declare them void. Applying this rule to the facts of this case, and the true construction of the act becomes very evident. By the constitution the legislature had no power to exempt stores or other places, purely or principally devoted to trade or business. By the act they have not said that such property should be exempt; but, on the contrary, their

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language indicates that which is entirely different; and hence an intention to exempt it cannot be inferred, nor can such effect be given to the act.

Having thus, from the previous condition of the law, and the language of the constitution, learned the evils complained of, and the intended mode of redress, we are made acquainted with the true reason of the remedy, or, what is the same thing, of the law itself. We are possessed of the ideas in which it originated, and by which its language was dictated. And unless, from some unknown cause, its language be clearly repugnant thereto, we are to so construe it that its results will conform to those ideas. We are to enter into, and be governed by, its spirit and reason, and the motives of those who enacted it. But as it is not contended by any one that there is anything in the language itself which conflicts with the general objects of the act as I have stated them, I need not dwell longer here.

This brings me to another rule, the consideration of which has led me seriously to doubt the correctness of one position which I took on the former occasion, which was, that the construction of the principal part of the building in question for a place of business, and the appropriation of the same as such by the debtor to the use of others, operated as a waiver or forfeiture of his right to claim any portion as his homestead. The rule to which I refer is, that we are to give such construction as shall suppress the mischief and advance the remedy, and avoid inventions and evasions for the continuance of the mischief, and give force and life to the cure and remedy. *Heydon's case*, 3 Co. Rep., 7. Upon further reflection on the facts of the case in connection with this rule, I am satisfied that I was in error, and that the law as laid down in *Rhodes et al. vs. McCormick*, 4 Iowa, 368, is correct. It will be remembered that the building was erected some years before the indebtedness to the plaintiff accrued, and that *Rooney's* occupancy of that portion used as a dwelling house, dated back to the time of its completion. So far as that portion is concerned, no change in its use or occupancy has occurred from that time to the present. His possession was not fraudulent in its inception. No element of dishonesty entered

into the manner in which he took it. His purposes originally were fair and upright, and, until the contrary be shown, cannot be presumed otherwise. I know of no sound principle upon which his mere continuance in the occupation as a dwelling house of that part designated and constructed as such, can be said to operate as a waiver or forfeiture of his right to claim it as exempt. Nor do I see how his possession can be said to have become fraudulent or dishonest. His subsequent embarrassments certainly cannot have such effect, for to give it to them would be to let in inventions and evasions for the continuance of the mischief, and to destroy the force and life of the cure and remedy at the very time when he most needed them, and when they were designed to operate most effectually in his favor. This would be to advance the mischief and suppress the remedy; it would make the presence of the disease a pretext for withdrawing the cure. I am, therefore, of opinion that that portion which was constructed and used as a dwelling house, was within the operation of the exemption law, and that no interest in it passed by virtue of the mortgage in question. But as to the residue of the building, which was separate and distinct from the dwelling, I think the mortgage was valid and passed the defendant *Rooney's* title and interest. Upon this branch of the inquiry, beside the case of *Rhodes vs. McCormick*, I wish to refer to some other authorities. It is well settled at common law, that houses and other buildings may be divided by horizontal as well as perpendicular lines, and that one person may be the owner in fee of the upper or other story, and another person of the residue of the building. *Loring vs. Bacon*, 4 Mass., 575, and *Cheesborough vs. Green*, 10 Conn., 318, and other cases there cited, are direct to this point. The first was a case where one party was seized in fee simple of a room on the lower floor of a dwelling house and of a cellar under it, and the other seized in fee of a chamber over it, and of the remainder of the house. Each was considered as the owner of a distinct dwelling house, the one over that of the other. Their relation to each other is thus defined by Chief Justice PARSONS, who delivered the opinion of the court: "Although in this case

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the parties consider themselves as severally seized of different parts of one dwelling house, yet in legal contemplation each of the parties has a distinct dwelling house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling house of the defendant; the chamber, roof, and other parts of the edifice, are the plaintiff's dwelling house." In the last case the plaintiff owned the foundation and first and second stories of a building, and the defendant the third story and roof of the same building. It seems clear, therefore, that it would have been competent for *Rooney*, had he been so disposed, to have conveyed absolutely, or by way of mortgage, the basement and first story of the building, reserving the upper stories, or those portions which were occupied as a dwelling house, of which he would have remained the owner in fee. If he could have done so by deed, it seems equally clear that the same thing can be accomplished by act and operation of law. Having never occupied the basement and lower story as a dwelling house, they were open to seizure and sale for the payment of his debts, leaving him in the undisturbed possession and use of the portion actually occupied for that purpose. Or, the basement and lower story having been so occupied, a subsequent voluntary abandonment of such use and occupation would at once render them liable to such seizure and sale, and consequently to alienation without the signature of *Mrs. Rooney*. The restriction of the husband's right to convey without the signature of his wife, is confined to the dwelling house *owned and occupied as such*, and the land upon which the same is situated. The law regards only that part of the building thus occupied, as the dwelling house, and looks upon it as *distinct* from the residue, as if it were separated by perpendicular walls. Hence, I am of the opinion that the mortgage was good as to the basement and first story of the building, and that it should be so far enforced.

A very strong, and to my mind conclusive argument against the position of the majority of the court, that the occupation by the debtor of any portion, however small, of a building as a place of residence, makes the whole building a

dwelling house, within the language and meaning of the statute, regardless of its structure, or the use to which the residue may be put, is to be derived from the principles of law applicable to controversies between landlord and tenant, as to the right of the tenant to remove buildings or fixtures erected by him during his term. Fixtures erected to carry on trade and manufactures, are, by the common law, removable by the tenant during his term; but fixtures erected for other purposes are not. Cases have occurred where they were erected for the double purpose of trade or manufacture, and as places of residence, and questions arisen as to the tenant's right to remove them under such circumstances. The turning point in such cases is said to be the purpose for which the building was chiefly designed and used. If it was *principally* to carry on trade or manufactures, and its occupancy as a dwelling but *incidental* to this main purpose, then the tenant has the right to remove it. If, on the other hand, the primary object was a dwelling house, and trade or manufactures the incidental use to which it was put, he has no such right. *Van Ness vs. Pacard*, 2 Peters, 137, was such a case, and it was determined upon these principles. It seems to me that they have a strong bearing upon the case under consideration, and that if they are correct for the purpose of determining the nature of the fixture, or kind of building, in the case of a tenant, they must also be correct and applicable to a case like this; and that consistency of reasoning would require the court, if *Rooney* had been a tenant, and had erected and occupied the building in precisely the same way, to overturn these much favored principles of the common law, and to hold that as between him and his landlord, he had no right of removal, because the building was a dwelling house, and not a fixture erected for the purpose of trade.

In my opinion the motion for a rehearing should be granted.

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AN INDEX

TO THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABATEMENT.

The objection that one of the grand jurors who found an indictment, was an alien, cannot be taken advantage of after a plea to the merits, although the disqualification was not known to the defendant until after such plea was filed. *Byrne et al. v. The State*, 519

ACCESSARY.

See CRIMINAL LAW, 18.

ACCOUNT.

See PAYMENT, 1.

1. Plaintiffs sent to defendant a statement of their account, containing sundry charges, giving defendant credit for sundry payments, and showing a balance due the plaintiffs of about \$400: *Held*, that the plaintiffs were not bound, in bringing suit, to declare for the balance of the general account so exhibited, but might select a single item in their account not larger in amount than such balance, and sue therefor; especially as it appeared that the item selected was the only one in the whole account, about which there was any dispute between the parties. *Ranney et al. v. Higby*, 61
2. Where an action has been brought for part of the items of a running account, omitting other items of the same account which were due at the time, and judgment has been recovered therefor, such judgment is a bar to another action afterwards brought to recover for the items so omitted. *Borngeuer v. Harrison*, 544
3. Where the court instructed the jury, that the judgment in such former action for part of an account was a bar to a subsequent action for the residue, and that "the whole account be-

ing between the same parties and for furnishing the same articles, all being due at the time the first suit was brought, a recovery for a part is a bar to a recovery for the other part." *Held*, that the instruction fairly implies that the jury must find that the account sued for in the second action was part of the same account which was the subject of the first action, before they could find that it was barred by the judgment; and that if the plaintiff desired to present to the jury more definitely, the question whether there were two accounts between the parties, he should have asked a specific instruction upon that point. *Ibid*.

4. There may be two or more running accounts in favor of one party against another, which might be the subject of separate suits, but the balance due to a party on account ordinarily constitutes but one demand, where there is nothing in the course or nature of the dealings, or in the mode in which the accounts are kept, to indicate a different intention of the parties. *Ibid*.

ACTION.

See PLEADINGS, 5.

1. By an act of the legislature, which took effect in April, 1855, it was enacted that, "All railroad corporations within this state shall be responsible and obligated in law to the laborers on the line or lines of railroads being constructed by said corporations, and are responsible and liable to pay for all labor performed by said laborers, severally, upon said road or roads, to the persons performing such labor * * * and for the purposes of this act, all the usual remedies by action are given to any and all such laborers against any such corporation. * * * No suit shall be maintained under the provisions of this act, until such laborer shall have given thirty days notice in writing to the president or secretary of such company, that wages are due him, and that the company is required to make payment for such wages so due, stating the amount claimed." This act was repealed by an act which took

effect in March, 1857, and which enacted that, "Whenever any laborer upon any railroad in this state shall have just claim or demand to the amount of twenty dollars or more for labor performed on such railroad, against any person being contractor on such railroad with the railroad company for the construction of any part of the railroad of said company, such railroad company shall be liable to pay such laborer the amount of such claim, provided such laborer shall have given notice to such railroad company, within thirty days after such claim or demand shall have accrued, that he has such claim or demand, and provided also, such claim or demand shall have accrued within sixty days prior to the giving of such notice," &c.: *Held*, that a person who performed labor for a sub-contractor, upon one of said railroads, in the summer and fall of the year 1856, and in October of that year gave notice of his claim to such railroad company, as required by the act of 1855, acquired a vested right to recover from such company the wages of such labor, which the act of 1857 could not divest, and an action against the company, for such wages, though not commenced until after the act of 1857 took effect, could be maintained. *Cole, J., dissenting. Streubel v. Mil. & Miss. R. R. Co.*, 67

2. A mortgagee of personal property may maintain replevin against a person taking the same in defiance of his right, although he was not in actual possession of the property, if, by the terms of the mortgage, he was entitled to take possession whenever he deemed that the safety of the debt required it. *Welch v. Sackett et al.*, 243

3. The assignee of a note, which was overdue and had been paid, cannot maintain an action upon it against the maker, although he took the assignment without notice of such payment. *Dunbar v. Harnberger*, 373

4. The mortgagor of personal property may maintain an action against the mortgagee (who has sold the same under a power of sale in the mortgage), for the surplus which remains after the debt and all reasonable costs and expenses are paid. *Flanders v. Thomas*, 410

5. An action does not lie against the state for services of attorneys employed by the school land commissioners, to defend suits brought against them in their official character in the supreme court. *Orton et al. v. The State*, 509

6. Where an action has been brought for part of the items of a running account (omitting other items of the same account, which were due at the time), and judgment has been recovered therefor, another action will not lie to recover for the items so omitted. *Bornesser v. Harrison*, 544

7. No action can be maintained upon a claim which has been allowed by the county judge,

or by the commissioners appointed by him to examine and adjust claims against the estate of the deceased, in accordance with the statute, unless, after an order of distribution has been made by the county judge, the administrator refuses or neglects to pay according to the order, in which case he becomes personally liable. *Price v. Didrick*, 624

8. Where a complaint averred that the written promise sued upon had been assigned by the promisee to the plaintiff, who thenceforth continued "to hold, own and possess the same for the benefit of" a certain bank, and was entitled to the sum due "for the benefit of" said bank, it was *held*, on demurrer, that the plaintiff was entitled to maintain the action in his own name, as a trustee of an express trust. *Kimball v. Spicer*, 658

9. The owner of a mortgage upon real estate, who has obtained a judgment of foreclosure and sale, may maintain an action for an injury done to the premises before the sale, which impaired the security and prevented the full amount of the debt from being realized, the mortgagor being insolvent, and the act having been committed wrongfully and fraudulently, with intent to injure the owner of the mortgage. *Jones v. Cordigan et al.*, 677

10. Where such injury is committed by the mortgagor, or others acting by his direction, knowing his insolvency, and the existence of the security, and that the act complained of will impair it, the action should be sustained. *Ibid.*

11. Where the owner of a mortgage has assigned it for the benefit of his creditors, the assignee is the proper plaintiff in an action for such an injury done after the assignment. *Ibid.*

ADMINISTRATORS AND EXECUTORS.

Where an administrator does not render an account of his administration to the probate court within one year from his appointment nor apply to the court to extend the time for doing so, the court may cite him to render such account upon its own motion, and without the application of any one interested in the estate. *In re Campbell*, 269

ADMISSIONS.

See EVIDENCE, 10.

AGREEMENT.

See CONTRACTS.

ALIENAGE.

See ABATIMENTS.

upon the law-making authority, whether they be expressed or implied, are general in their character, the safest and wisest rule, undoubtedly, is for the courts not to interfere, if the alleged infringement fairly admits of doubt or controversy; but when, as in the present instance, the violation is bold and palpable, their duty to do so is plain and obvious.

It is possible to say of section 9, that its concluding words, "conformably to the laws," give to the legislature a discretionary power to provide such remedies and prescribe such forms and modes of proceeding to obtain justice as it pleases; and that under them, it may, at its option, without supplying others, abolish all remedies, and annul all the means by which rights are to be ascertained and justice administered.

It seems obvious to me that such was not the meaning which the people intended should be attached to these words; and unless it is, and there is thereby expressly granted to the legislature, an unlimited power to deal with remedies and the course of justice as it pleases, I am not among those who can subscribe to its omnipotence, or yield that it is absolute and without control with regard to either. The framers, after having by the preceding portions of the section fully expressed the leading objects of it, evidently introduced these words as a constitutional affirmation that every person must seek his remedy and obtain justice in conformity with, or agreeably to, "the laws" which must be enacted for those purposes. The nature and qualities of those laws are fully prescribed. They must be such as will afford every person a certain remedy in them for all wrongs or injuries which he may receive in person, property, or character; and such that by them he may obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay. After having, so far as the laws were concerned, secured to each individual such a remedy and such a measure of justice, they bound him to seek them pursuant to those laws, and in effect said, he must do so "conformably to" them, and in no other way. These words, then, instead of operating as an extension of the powers of the legislature, are in reality a restriction of the natural rights of the citizen. Laws complying with the require-

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ments of the section must, therefore, be passed, and in pursuance of them, wrongs must be redressed and justice administered. It may be that there are some omissions of duties imposed by the constitution, against which it was impossible for the people completely to guard, and for which they could provide no direct or immediate remedy; but such was never the case, so far as it concerned the obligations created by the section under consideration. The people themselves executed the duties enjoined by it at the time they ratified the constitution. When the constitution was adopted, and when under it the people were about to pass from the condition of a territory to that of an independent state, they were in the enjoyment of a code of laws, by virtue of which remedies were afforded and justice was administered in as full and ample a manner as this section requires; and those laws they cautiously preserved in full force until they should be repealed and others enacted in their place. The second section of Article XIV, called the "schedule," provided that all laws then in force in the territory of Wisconsin, which were not repugnant to the constitution, should remain in force until they expired by their own limitation, or were altered or repealed by the legislature. These duties were, therefore, executed when we came into existence as a state, and being so, it was not in the power of the legislature to repeal those laws, without at the same time passing others which should substantially comply with the requirements of the constitution. It could not abrogate them entirely, and leave these plain and positive constitutional duties partially or altogether unperformed. Being once performed, no authority was given to the legislature to bring them to nought. To claim that it could do so, is to claim that the power of the agent exceeds that of the principal, and that the will of the legislature, which is a mere instrument in the hands of the people, created by them for the purpose of carrying out their wishes as expressed in, and implied from the constitution, is superior to the will of the people themselves, as declared in that instrument in obedience to which they have asserted that all power must be exercised. It is claiming that the legislature, which is subor-

AMENDMENT.

1. Where a defendant appeals from a judgment of a justice of the peace to the county court, the plaintiff may, by leave of that court, before trial, amend his complaint, by increasing his claim for damages to an amount beyond the jurisdiction of the justice of the peace; and may recover such increased amount, if the justice of his case require it. *Dressler v. Davis*, 58
2. Amendments to pleadings rest upon the sound discretion of the court before which the case is tried, and will not be reviewed on error or appeal, except in cases where the discretion has been manifestly abused. *Gillett et al. v. Robbins*, 319
3. Where averments, however defective, are sufficient to inform the opposite party fully of the facts intended to be proved, an amendment to such averments allowed at the trial for the purpose of remedying their defects, will not constitute such a surprise upon the opposite party as will entitle him to a continuance of the cause, even though he may have relied upon such defects to obtain a judgment. *Ibid.*
4. Where a judgment has been entered by the clerk under sec. 27, chap. 132, R. S., 1568, and a motion made to set aside the judgment, on the ground that there had not been a personal service of the summons, leave should be granted for the sheriff to amend his return, if an amendment thereof, according to the facts, would show such personal service. *Moyer v. Cook*, 335
5. Where a judge files a finding which is excepted to as not being in accordance with the Code, he has power to file an amended finding, and the time and manner of his doing so must depend in a great measure upon his discretion. *Keep v. Sanderson*, 353
6. Where an action has been brought for damages for the wrongful erection and maintenance of a mill dam—and also for an injunction against the further maintenance of such dam, the plaintiff should not be allowed at the trial to amend his complaint, so as to make it conform to the provisions of the mill dam law, and proceed for the recovery of compensation under that law. *Newton v. Allis*, 378

ANSWER.

See PLEADINGS, 1, 2, 6, 7, 14, 19, 24, 25.

A verified answer in an action under the Code, is not evidence for the defendant, as was an answer under oath, under the former practice in equity. *Staat v. Sigelkow*, 234

APPEAL.

1. From an order denying a motion to require

a complaint to be rendered more definite and certain, an appeal lies. *Clark et al. v. Langworthy*, 444

2. Where an appeal, taken from an order of a county court sitting as a court of probate, to a circuit court, has been heard by the latter on the merits, a judgment must be rendered therein, affirming or reversing, in whole or in part, the order appealed from, or making such other order as the county court ought to have made; and it is error for the circuit court to *dismiss* the appeal on the ground that no sufficient reason appears for reversing such order. *In re Newland and Danids*, 490
3. A summons in an action in a county court was tested in the name of the judge of the circuit court for that county: *Held*, that the matter of the attestation did not involve "the merits of the action or any part thereof," nor "affect a substantial right," and that an appeal does not lie from an order denying a motion to strike out the summons and complaint for irregularity and inconsistency, and to set aside a judgment regularly rendered in such action, for want of an answer. *Rahn v. Gunnison*, 523
4. A prosecution for bastardy is a *quasi* criminal proceeding, and cannot be brought to this court by appeal, but by writ of error only. *State v. Mushied*, 561
5. An appeal to this court falls upon the discontinuance of the action in the inferior court. *Spaulding v. Mil. & Her. R. R. Co.*, 607

APPLICATION OF PAYMENTS.

See PAYMENT, 1.

APPROPRIATION OF PROPERTY TO PUBLIC USE.

See COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. A clause in an assignment by an insolvent debtor for the benefit of creditors, authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may appear best and most to the interest of the parties concerned," is equivalent to authority to sell on credit, and such an assignment operates to hinder and delay creditors, and, as against them, is fraudulent and void. *Keep v. Sanderson*, 2 Wis., 42, cited and adhered to. *Keep v. Sanderson*, 362
2. Where the assignee under such an assignment, is summoned as garnishee under an attachment against the property of the assignor, by one of such creditors, and it appears

on the hearing, that after the service of such summons he had converted the assigned property into money, or that before such service he had converted the same into money which then remained in his hands, he is to be regarded as indebted to the assignor for the money so received by him, and the creditor is entitled to judgment against him, as garnishee, accordingly. *Ibid.*

3. Where the finding of the court sets forth at large the assignment under which a garnishee received the property for which he is sought to be made accountable, and that assignment is "by its very terms fraudulent in law and in fact," the invalidity of the assignment sufficiently appears by such finding. *Ibid.*

ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION.

See STATE SUPERINTENDENT OF PUBLIC INSTRUCTION.

ATTACHMENT.

1. The district court of the United States for the district of Wisconsin, has the power to adopt by rule, and in the cases provided by law in this state, to issue, in common law actions, process of attachment against the property of debtors, as a provisional remedy, according to the form and mode of proceeding prescribed by the Code of Procedure of this state. *Adler v. Cole et al.*, 188
2. Where an assignee of property for the benefit of creditors is summoned as garnishee under an attachment against the property of the assignor, by one of such creditors, and it appears, on the hearing, that after the service of such summons he had converted the assigned property into money, or that before such service he had converted the same into money which then remained in his hands, he is to be regarded as indebted to the assignor for the money so received by him, and the creditor is entitled to judgment against him, as garnishee, accordingly. *Keop v. Sander-son*, 352
3. A judgment against the defendants in an attachment suit is not void for want of jurisdiction because the defendants were non-residents, and were not served with process, and because at the time of rendering such judgment the garnishee had filed an answer denying that he was indebted to the defendants, or had any property belonging to them in his possession, the issue upon which answer was then undetermined, if it appear that such issue was afterwards determined against the garnishee, and judgment rendered against him, it being the fact of the garnishee's indebtedness and not its ascertainment, which conferred jurisdiction against the principal debtors. *Ibid.*
4. Where an issue is made between the plain-

tiff in an attachment suit and a garnishee, upon the answer of the latter, it seems that such answer is never admissible in evidence on the trial of such issue; but where, under the law allowing parties to be witnesses in their own behalf, the garnishee caused his own deposition to be taken and read on the trial of such issue, there was clearly no error in excluding his answer as evidence. *Ibid.*

B

BANKING LAW.

1. By sections 4 and 5 of Article XI of the constitution of this state, there is a substantial reservation to the people themselves of all legislative power upon the subject of banks and banking. *State ex rel. Reedsburg Bank v. Hastings*, 47
2. The clause in the constitution which requires that "the rule of taxation shall be uniform," is a limitation upon the legislature in the exercise of its general power to levy taxes, and not a restriction upon the people in the exercise of the power thus reserved. *Ibid.*
3. That portion of the banking law of this state which regulates the taxation of the capital stock of banks, is therefore not in violation of that clause in the constitution. *Ibid.*

BANKS.

1. A bank is bound by the act of its cashier in making an assignment of a debt due to it, even if he exceeded his powers in making such assignment, where it appears that the transaction was entered upon the books of the bank, so as to show the fact of the assignment and the consideration received for it, and that the books were often examined by committees appointed for that purpose, reported correct, and the reports adopted by the directors, and a note taken as the consideration for the assignment, was mentioned in the semi-annual reports made under oath to the bank comptroller, as part of the assets of the bank. *Racine Co. Bank v. Lathrop et al.*, 466
2. A bank in Madison received by mail, for collection, a note made and indorsed by persons living at Stoughton, a place about twenty miles from Madison, but with which there was a daily communication by railroad. There was no bank at Stoughton, and, before the note fell due, the bank at Madison delivered it for collection to an express company, which had an office in Stoughton, and was in the practice of collecting such paper, and was responsible, and reputed to be a prompt and capable collecting agent. The express company delivered the note, in due time, to a notary public residing in Stoughton, for presentation, and protest if not paid, but the notary made his demand of payment one day before the note fell due, and on the same day deposited notice of non-payment, for the in-

dorser, in the post-office at Stoughton, although the indorser, who was then absent from home, had his place of residence in said village, whereby, the makers being insolvent, the debt was lost. *Held*, that the contract implied from the receipt by a bank of a note for collection, payable at a distance from its place of business, is not absolutely to make due presentment of the note and give due notice of its non-payment, but to place it in the hands of some competent and responsible agent for that purpose, and that if the bank exercises reasonable care and skill in selecting such agent, it is not liable for his default. *Stacy & al. v. Dane Co. Bank*, 629

3. *Held*, also, that a person charged with the collection of commercial paper, may, in the absence of any direct notice to the contrary, assume that a notary, appointed by public authority, is a fit and proper agent to discharge the duties of his office, and that if the express company were to be regarded in this case solely as the agent of the bank, the duty of the latter was performed when the note was placed in the hands of a notary, at Stoughton, in due time to make proper presentment and protest. *Ibid.*

BASTARDY.

1. The circuit court of a county has jurisdiction of a prosecution for bastardy, which was commenced before a justice of the peace of the same county, and in which the defendant was recognized to appear in such circuit court, although the complainant was, at the time of the birth of the bastard child, and of the commencement of the prosecution, a resident of another county in this state. *Owen v. The State*, 559
2. A prosecution for bastardy is a *quasi* criminal proceeding, and cannot be brought to this court by appeal, but by writ of error only. *State v. Mushied*, 581

BILL OF REVIVOR.

See EQUITY, 6.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILLS OF EXCHANGE.

See COMMERCIAL LAW, 1, 6.

C

CASES OVERRULED, DOUBTED, &c.

1. The dictum in *Gitty vs. Rountree*, 2 Chandler, 28, that where there is a warranty but no fraud, in the sale of personal property, the vendee is not entitled, against the will of the

vendor, to return the article and recover back the price paid, but that his only remedy is by a suit for damages, or by recoupment in case he is sued for the purchase money, is commented on. *Fisk v. Tank et al.*, 276

2. *Ainsworth vs Bowen*, 9 Wis., 348, so far as it seems to sanction the doctrine that school land certificates are a proper subject of pledge, and that a sale of the certificates by the pledgee is a sale of the pledgor's interest in the land, is overruled. *Mowry v. Wood*, 418

CERTIORARI.

A common law *certiorari* is not the proper proceeding to correct the errors of inferior tribunals in executing the powers delegated to them. Its object is to confine such tribunals within their jurisdiction, and prevent them from exercising powers not delegated. *Tallmadge et al. v. Potter*, 817

CHATTEL MORTGAGE.

1. The concurrent execution and delivery of two chattel mortgages upon the same property, to different parties, makes the mortgagees tenants in common of the property mortgaged, and they should join in an action for the unlawful taking or the conversion of it. *Welch v. Sackett et al.*, 243
2. A mortgagee of personal property may maintain replevin against a person taking the same in defiance of his right, although he was not in actual possession of the property, if, by the terms of the mortgage, he was entitled to take possession whenever he deemed that the safety of the debt required it. *Ibid.*
3. Where a debtor made several chattel mortgages to certain of his creditors, in their absence and without their knowledge, and handed the same to his own attorney with a declaration that he delivered them to him for the use of the mortgagees, and the attorney, at his request, filed the mortgages in the office where by law such mortgages were required to be filed, and wrote to the mortgagees, notifying them of the execution of such mortgages, but attachments were levied upon the same goods, by other creditors of the mortgagor, before the mortgagees had received notice of, and had assented to, or accepted said mortgages: *Held*, that the attachments were entitled to preference. *Ibid.*
4. A mortgagee of personal property who sells the same after default, under a power of sale contained in the mortgage, is accountable to the mortgagor for the surplus, after the debt and all reasonable costs and expenses are paid. *Flanders v. Thomas*, 410
5. The intent of the provision in sec. 5, chap. 45, R. S., 1853, which relates to making, and annexing to a chattel mortgage on file in the town clerk's office, within thirty days before

the expiration of one year from the time of its first filing, an affidavit by the mortgagee of his continued interest in the property mentioned therein, was that, in case of failure to file such affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize the property, or purchasers who should thereafter purchase it. Such affidavit is not necessary to preserve, after the expiration of the year, the right of the mortgagee to maintain his action against a person who had seized the mortgaged property, in violation of his rights, before the year had expired. *Newman v. Tymeson*, 445

CITIES.

1. The legislature has power to prescribe the qualifications of city, town or village officers. *State ex rel. Tuck v. Von Raumbach*, 810
2. A provision in the charter of a city, that "if any member of the common council shall, while a member, be elected to any other office of said city, such election shall be void," is not unconstitutional. *Ibid.*
3. Where the charter of a city provided that upon the application of two-thirds of the owners of lots on a street, or part of a street, the council should have power to cause such street, or part of a street, to be graded, &c., and for the purpose of defraying the cost, to levy and collect a special tax on the lots abutting on such street, or part of a street, in proportion to the front or size of such lots respectively, it was held, that so much of an ordinance requiring such an improvement to be made, as directed that each lot, or part of a lot, should be charged with the cost of the work done in front thereof, to be collected as a special tax, was repugnant to the charter and void. *State ex rel. Christopher v. The City of Portage*, 583
4. *Ibid.*, also, that it was not necessary for the city council to have provided in one ordinance for the doing of the work and for the manner of its payment, and although that part of the ordinance above referred to as being repugnant to the charter, is void, the other portion of it, which directed that the work should be done, and the contracts for doing it should be let, &c., may be sustained, and that the council are bound to provide for the assessment and equalization of a tax for the whole work done, among the several lots liable therefor, as the charter contemplates, if, under the circumstances, the provisions of the charter in that respect can still be substantially executed. *Ibid.*
5. Under the power to order the improvement of a street, or part of a street, the city council might order the making of a sidewalk on one side of a street only. *Ibid.*
6. Where a municipal corporation is created without any express restriction upon its power to levy taxes or raise money, it can exercise that power only for legitimate municipal purposes, the power of the corporation in that respect being limited by the object and purpose of its creation. *Foster v. The City of Kenosha*, 616
7. The legislature cannot confer upon a municipal corporation an unlimited power to levy taxes and raise money, aside from and above what may be necessary and proper for legitimate municipal purposes; the grant of such unlimited power being inconsistent with section 3 of Article XI of the constitution, which requires that the legislature, in organizing such corporations, "shall restrict their power of taxation, assessment, borrowing money, contracting debts," &c. *Ibid.*
8. That section of the constitution does not contain a grant of power to the legislature to organize cities, but is a restraint upon that power. *Ibid.*
9. A provision in the charter of a city that no tax shall be levied or money be borrowed beyond what may be needed for legitimate municipal purposes, without the previous sanction of a majority of the voters, is not a limitation upon its power to levy taxes or contract debts, within the meaning of that section of the constitution. The duty of imposing the proper limitation belongs to the legislature, and cannot be transferred to others. *Ibid.*
10. An amendment to the charter of the city of Kenosha, declared that the city council should have power to levy and collect special taxes for any purpose (aside from what was specially provided for in the original charter), which might be considered essential to promote or secure the common interest of the city, or might borrow on the corporate credit of the city for such purposes, any sum of money for any term of time, &c., but that no such tax should be levied or money borrowed, except in accordance with a section of the original charter, which provided that no such tax should be levied, or money be borrowed, without the consent of a majority of the voters who should vote upon the question as a special election to be held for that purpose. Afterwards the city of Kenosha subscribed \$150,000 to the stock of the Kenosha and Beloit Railroad Company, in pursuance of the vote of a majority of the legal voters of said city, and issued scrip to the amount of \$60,000 in part payment therefor, and levied a tax to provide for the payment of said scrip. In a suit by a tax-payer in said city, to restrain the collection of said tax, it was held, that said amendment to the charter of said city was in conflict with section 3 of Article XI of the constitution; that the act of the city council in creating said debt, was unauthorized; and that the collection of said tax should be restrained. *Ibid.*
11. Whether it follows that the scrip so issued is void, the court does not, in this action, determine. *Ibid.*
12. The charter of the city of Milwaukee gives the common council power to regulate the place

and manner of selling hay within the city, and an ordinance forbidding, under a penalty of not less than five, nor more than ten dollars, the exposing of any load of hay for sale, in certain wards of the city, without first having such load weighed by the attendant of some established and sealed city hay scale, and obtaining from him a certificate of the weight (for which said attendant was allowed to charge twelve cents), to be exhibited to the purchaser of the hay, before receiving payment therefor, is not unreasonable, oppressive, or repugnant to the constitution and laws of the state. *Yates v. The City of Milwaukee*, 673

13. The fact that the city appointed a person to be weigher of hay and inspector of wood in said wards, on condition that he would pay to those wards \$500 per annum, is no defense to an action for a violation of said ordinance. *Ibid.*

COMMERCIAL LAW.

1. A bank discounted two drafts, drawn by L. & Co. on, and accepted by, M., V. & Co., at 30 days, the proceeds of which were used in the purchase of wheat, which was bought on joint account of the drawers and the acceptors, and was shipped to the acceptors for the purpose of meeting the drafts. The bank assigned the drafts to B., C. & Co. Before the maturity of the drafts, M., V. & Co. suspended payment, and the drafts were protested. About the same time B., C. & Co. suspended payment, being indebted to said bank, on balance of account, in a sum exceeding the amount of both drafts. The cashier of the bank assigned to M., V. & Co. the account of the bank against B., C. & Co., to enable them to set off the same against the drafts in the hands of B., C. & Co., stipulating in the assignment (which was in writing) that the bank would do nothing to hinder M., V. & Co. from collecting the account; and as a consideration for the assignment, took the note of M., V. & Co., payable one day after date. Before the assignment was made, the cashier, with a view to enable the bank to secure its claim against B., C. & Co. by making such assignment, had requested M., V. & Co. not to pay the drafts, and on the day the assignment was made he informed L. & Co. that he had made an arrangement by which they were relieved from said drafts. For two years after that time M., V. & Co. were in a condition to have secured L. & Co. in the amount of the drafts, and L. & Co. had extensive dealings with M., V. & Co. (who at the time of this suit were insolvent), which were conducted upon the understanding that said drafts were settled. The bank afterwards procured a re-assignment of the drafts from B., C. & Co., agreeing to give them credit for the same on the account above mentioned, and then sued L. & Co. upon the drafts. *Held*, that L. & Co. were discharged from their liability to the bank upon the drafts, on the ground that the assignment of the account to M., V. & Co. for the purpose of being used in payment of the drafts, and the taking of their note at one day after date therefor, was at least an extension to the acceptors of time of payment of the debt represented by the drafts, for the days of grace to which the note was entitled, without the consent of the drawer; and on the ground that the bank is estopped from now showing, to the injury of L. & Co., that its former representations, upon which they had acted, were untrue; and that the drafts ought to be considered as having been paid with the property of M., V. & Co. *Macine Co. Bank v. Lathrop et al.*, 406
2. A and others delivered to the treasurer of a railroad company their note for \$5,000, payable to his order, at six months after date, upon an express agreement with said company, that the note should be negotiated and its proceeds applied solely to the purchase of iron for said road, in whose early completion they were interested; but before the maturity of said note, the company borrowed \$2,000 from B. (no part of which was used in the purchase of iron), and indorsed and pledged to him said note for \$5,000, as security for its re-payment. The loan not being repaid when it fell due, B. gave notice that he would sell said note of \$5,000, at public sale, for the purpose of raising the amount of said loan: *Held*, that B., to the extent of the loan made by him on the credit of said note, without notice of facts impeaching its validity, was a *bona fide* holder for value, and that a complaint by the makers of said note, stating the facts and praying that B. might be enjoined from selling said note, and that as to any liability of the makers thereof to B., it might be declared void, was bad, on demurrer. *Bond et al. v. Wilton et al.*, 611
2. A bank in Madison received by mail, for collection, a note made and indorsed by persons living at Stoughton, a place about twenty miles from Madison, but with which there was a daily communication by railroad. There was no bank at Stoughton, and, before the note fell due, the bank at Madison delivered it for collection to an express company, which had an office in Stoughton, and was in the practice of collecting such paper, and was responsible, and reputed to be a prompt and capable collecting agent. The express company delivered the note, in due time, to a notary public residing in Stoughton, for presentation, and protest if not paid, but the notary made his demand of payment one day before the note fell due, and on the same day deposited notice of non-payment, for the indorser, in the post-office at Stoughton, although the indorser, who was then absent from home, had his place of residence in said village, whereby, the makers being insolvent, the debt was lost. *Held*, that the contract implied from the receipt by a bank of a note for collection, payable at a distance from its place of business, is not absolutely to make due presentment of the note and give due notice of its non-payment, but to place it in the hands of some competent and responsible agent for that purpose, and that if the bank exercises reasonable care and skill in select-

- ing such agent, it is not liable for his default.
Stacy et al. v. Dane County Bank, 629
4. *Held*, also, that a person charged with the collection of commercial paper, may, in the absence of any direct notice to the contrary, assume that a notary, appointed by public authority, is a fit and proper agent to discharge the duties of his office, and that if the express company were to be regarded in this case solely as the agent of the bank, the duty of the latter was performed when the note was placed in the hands of a notary at Stoughton, in due time to make proper presentment and protest. *Ibid.*
 5. The courts of this state will not take judicial notice of the laws of other states, but in the absence of any proof to the contrary, will presume them to be in accordance with our own.
Waleh v. Dart, 635
 6. By the law of this state bills payable at sight are entitled to three days of grace, and in a suit in a court of this state against the indorser of such a bill, payable in the state of New York, the court must presume, unless there is proof to the contrary, that the bill was entitled to days of grace by the law of that state, and hold that a protest of such bill for non-payment on the day it was first presented to the drawees, was premature and insufficient to charge the indorser. *Ibid.*
 7. Where a promissory note is indorsed by the payee, and also by another party, the legal inference from the instrument itself, is that the payee is the first indorser. *Cady v. Shepard,* 639
 8. Parol evidence is admissible to prove the circumstances attending the indorsement by such other party, which may give him the character of a prior indorser in respect to the payee. *Ibid.*
 9. A made and delivered to B his promissory note, payable to the order of B, and indorsed in blank by C; said note being given for goods sold and delivered by B to A upon the faith and credit of C's indorsement, which C then agreed to give for that purpose, and which he did give in pursuance of such agreement, with intent to become liable to B in the amount of the note. Demand at maturity, protest for non-payment, and notice to C, were duly made and given: *Held*, that by commercial usage C was liable, as a prior indorser, to B. *Ibid.*
 10. The proper mode of pleading in such a case, is to state in the complaint the facts which make the defendant liable in the character of a prior indorser. *Ibid.*
- COMMISSIONERS OF SCHOOL AND UNIVERSITY LANDS.
1. Sec. 61, chap. 28, R. S., 1853, authorized the commissioners of school and university lands to publish the list of forfeited lands lying in any county, in only one newspaper published in such county. *State ex rel. Harney v. Hastings,* 696
 2. Said commissioners made an order for the publication of such list for a certain county, in a newspaper published therein by A, and notified A of said order, and requested him to do the work, but after such notice and request, a majority of the commissioners made and entered upon their book another order, directing the publication of said list in another paper, published in said county by B. No notice of the making of the second order, or of a revocation of the first, was given to A, who performed the work as directed, and received payment therefor from the state. B published the list also, under the second order, and applied for a mandamus to compel the treasurer of state to pay his account therefor, which had been audited by the proper officer: *Held*, that the commissioners could not relieve the state from its contract with A, by revoking the first order without notifying him of the withdrawal of their proposition before he had accepted it. *Ibid.*
 3. *Held*, also, that it was not material whether A had actually notified the commissioners of his acceptance of their proposal to him, or had done any act of acceptance, before the second order was made, if he did accept their proposal within a reasonable time after it was made, and before he had any notice of its revocation. *Ibid.*
 4. *Held*, also, that B had no valid claim against the state for work done under such second order, that order having been made without authority of law. *Ibid.*
- COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE.
1. A complaint, filed in November, 1853, against a railroad company and its lessee, alleged that the defendants had taken and appropriated for the road-bed and other uses of said company, certain real estate of the plaintiff (who was a resident of Wisconsin) without his consent, and had failed, for more than six months after such taking and appropriation, to pay to the plaintiff any compensation therefor, or to take any steps to have the amount of compensation due him therefor assessed; and demanded that the damages to said land, caused by its use and occupation by the defendants should be assessed, and said railroad company be adjudged to make compensation to the plaintiff for such damages, and that in the meantime, and until such compensation were made, the defendants should be enjoined from running cars over said land: *Held*, that the complaint did not contemplate a recovery of damages as for a trespass *quare clauum/fregit*, but the assessment of a compensation for the land so taken; and a judgment rendered in such action for damages as for a trespass upon the plaintiff's land, was

erroneous. *Davis v. The La Crosse and Milwaukee Railroad Co. et al.*, 16

2. *Held, also*, that such judgment could not be permitted to stand as a compensation for the land taken, it appearing from the pleadings, that there were divers persons holding mortgages upon said land, who had not been made parties to the suit, but were necessary parties in any proceeding to obtain such compensation. *Ibid.*

3. *Held further*, that upon the case presented in the complaint, the plaintiff was entitled, under the statute of 1853, to an injunctive order, restraining the said company and all claiming under it, from running cars or locomotives upon said land of the plaintiff, or using the same in any manner, until such compensation, together with costs, &c., should be paid to the person entitled thereto. *Ibid.*

4. Before the public can acquire the right to enter upon, and permanently occupy land which may be needed for its use, against the will of the owner, the value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid to the owner; or if not paid to, or received by him, an adequate and safe fund must be provided, from which he may, at some future time, be compensated. *Powers et al. v. Bears et al.*, 213

5. In the case of a private corporation, like a railroad company, this principle would require it to tender in money the ascertained damages or compensation, with expenses, if any, to the owner or person interested, and if he should refuse to receive it, to deposit the same with some proper person, to be kept for the owner until he shall apply for it. *Ibid.*

6. A statute provided that a railroad company, before seizing and appropriating the land of others to its own use, should, by its agent, first offer to pay to the owner or owners, the sum which such agent and two disinterested freeholders of the county where the lands are situate, should, on oath and in writing, swear to be a just compensation for such land and damages: *Held*, that such a proceeding to ascertain the value of land so to be appropriated, is not a compliance with the requirements of the constitution. *Ibid.*

7. A tender to the owner of land, of a compensation assessed in the mode prescribed by that statute, which he refused to accept, did not give the railroad company the right to appropriate the land to its own use, and an injunction was properly granted, to restrain such company from the further occupancy or appropriation of said land. *Ibid.*

8. The commissioners to value the land in such case, and ascertain the damages sustained by the owner, should be impartial men, indifferently chosen or appointed between the parties, and their investigation open and known to both parties, giving to each an opportunity

to be heard, and to offer such evidence as may be proper. *Ibid.*

COMPLAINT.

See PLEADINGS, 3, 4, 8, 9, 10, 11, 12, 16, 17, 21.

CONDITION.

1. A subscription for railroad stock made on the 5th of July, 1855, contained a stipulation that the subscriber might forfeit his stock after paying one-third of the amount subscribed, provided notice of his intention to forfeit should be given to the company prior to the 1st of July, 1855: *Held*, that such notice being impossible, the condition really never existed. *Racine Co. Bank v. Ayers*, 512
2. Where the assistant state superintendent of public instruction decided, upon appeal, that certain portions of a joint school district should be detached and erected into a new district, which should be the legal successor of said original joint district, but provided that said new district should pay to the other portions of said original district, a certain sum of money, and that the decision should be null and void, except upon the making of said payment: *Held*, that even if the decision were valid, such new district was not entitled to possession of the school house which had belonged to the original joint district, until actual payment of the sum so directed to be paid. *Joint School District v. Wolfe*, 685

CONSTITUTIONAL LAW.

1. By sections 4 and 5 of Article XI of the constitution of this state, there is a substantial reservation to the people themselves of all legislative power upon the subject of banks and banking. *State ex rel. Reedsburg Bank v. Hastings*, 47
2. The clause in the constitution which requires that "the rule of taxation shall be uniform," is a limitation upon the legislature in the exercise of its general power to levy taxes, and not a restriction upon the people in the exercise of the power thus reserved. *Ibid.*
3. That portion of the banking law of this state which regulates the taxation of the capital stock of banks, is therefore not in violation of that clause in the constitution. *Ibid.*
4. Upon a judgment for damages for the wrongful and fraudulent misapplication and conversion of school land certificates, deposited as security for a loan, an execution against the person may be issued, after the return of an execution against property, unsatisfied in whole or in part. The defendant in such a case is not entitled to exemption from imprisonment under section 16 of Article I of the constitution of this state, which provides that

- "no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied." *In re Moury*, 52
5. The legislature has not the power, either directly or indirectly, to divest a municipal corporation of its private property, without the consent of its inhabitants. *The Town of Milwaukee v. The City of Milwaukee*, 98
 6. The legislature, however, has an undoubted right to change the territorial limits of municipal corporations, and to detach from a town a portion of its territory and annex it to another town; and, in so doing, may provide for an equitable division of the common property. *Ibid.*
 7. Where the legislature takes from a town a portion of its territory, which includes land to which it has the exclusive title, and annexes the same to another town or municipality, without providing for the disposal of such land, under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such land, notwithstanding such separation. *Ibid.*
 8. By an act of the territorial legislature, approved January 3d, 1838, fractional townships 7 and 8, in Milwaukee county, were formed into a town by the name of the town of Milwaukee, and on the 14th of January, 1843, the supervisors of the town acquired, by purchase, a title to the land in controversy, "in trust for the sole use and benefit of said town forever;" the territorial statute, at the time, giving to every such town, as a body corporate, the power to hold real estate for the public uses of its inhabitants, and convey or dispose of the same as might be deemed conducive to their interests, and providing, also, in case of the division of a town, or annexation of a part thereof to another town, for an equitable partition of such real estate, or apportionment of its proceeds, by the supervisors of the respective towns. The provision for the apportionment of property in case of the division of towns, ceased to be in force from and after the first day of May, 1849. On the 3d of January, 1854, a portion of town 7 was incorporated as the village of Milwaukee, but the government of the town of Milwaukee continued over both fractional towns, until January 31st, 1846, when the charter of the city of Milwaukee put an end to the government of the town of Milwaukee, in the territory embraced in the city limits, and the land in controversy continued to be within the town of Milwaukee until February, 1852, when the limits of the city of Milwaukee were enlarged by an act of the legislature, so as to include said land; none of said acts making any provision for the division or apportionment of the common property: *Held*, that the act extending the limits of the city of Milwaukee over the land in question, did not divest the town of its title thereto. *Ibid.*
 9. Before the public can acquire the right to enter upon, and permanently occupy land which may be needed for its use, against the will of the owner, the value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid to the owner; or if not paid to, or received by him, an adequate and safe fund must be provided, from which he may, at some future time, be compensated. *Powers et al. v. Bears et al.*, 213
 10. In the case of a private corporation, like a railroad company, this principle would require it to tender in money the ascertained damages or compensation, with expenses, if any, to the owner or person interested, and if he should refuse to receive it, to deposit the same with some proper person, to be kept for the owner until he shall apply for it. *Ibid.*
 11. A statute provided that a railroad company, before seizing and appropriating the land of others to its own use, should, by its agent, first offer to pay to the owner or owners, the sum which such agent and two disinterested freeholders of the county where the lands are situate, should, on oath and in writing, swear to be a just compensation for such land and damages: *Held*, that such a proceeding to ascertain the value of land so to be appropriated, is not a compliance with the requirements of the constitution. *Ibid.*
 12. A tender to the owner of land, of a compensation assessed in the mode prescribed by that statute, which he refused to accept, did not give the railroad company the right to appropriate the land to its own use, and an injunction was properly granted, to restrain such company from the further occupation or appropriation of said land. *Ibid.*
 13. The commissioners to value the land in such case, and ascertain the damages sustained by the owner, should be impartial men, indifferently chosen or appointed between the parties, and their investigation open and known to both parties, giving to each an opportunity to be heard, and to offer such evidence as may be proper. *Ibid.*
 14. The legislature has power to prescribe the qualifications of city, town or village officers. *State ex rel. Teach v. Von Baumback*, 310
 15. A provision in the charter of a city, that "if any member of the common council shall, while a member, be elected to any other office of said city, such election shall be void," is not unconstitutional. *Ibid.*
 16. The statute which provides that where a mortal wound shall be given in one county, by means whereof death shall ensue in another, the offense may be prosecuted in either county, is not in conflict with that provision of the constitution which secures to a person accused the right to a trial by a jury of the county or district wherein the offense was committed. *Dixson, C. J., dissenting. The State vs. Pauley*, 57

17. Where a municipal corporation is created without any express restriction upon its power to levy taxes or raise money, it can exercise that power only for legitimate municipal purposes, the power of the corporation in that respect being limited by the object and purpose of its creation. *Foster vs. The City of Kenosha*, 616

18. The legislature cannot confer upon a municipal corporation an *unlimited* power to levy taxes and raise money, aside from and above what may be necessary and proper for legitimate municipal purposes; the grant of such unlimited power being inconsistent with section 3 of Article XI of the constitution, which requires that the legislature, in organizing such corporations, "shall restrict their power of taxation, assessment, borrowing money, contracting debts," &c. *Ibid.*

19. That section of the constitution does not contain a grant of power to the legislature to organize cities, but is a restraint upon that power. *Ibid.*

20. A provision in the charter of a city that no tax shall be levied or money be borrowed beyond what may be needed for legitimate municipal purposes, without the previous sanction of a majority of the voters, is not a limitation upon its power to levy taxes or contract debts, within the meaning of that section of the constitution. The duty of imposing the proper limitation belongs to the legislature, and cannot be transferred to others. *Ibid.*

21. An amendment to the charter of the city of Kenosha, declared that the city council should have power to levy and collect special taxes for any purpose (aside from what was specially provided for in the original charter), which might be considered essential to promote or secure the common interest of the city, or might borrow on the corporate credit of the city for such purposes, *any* sum of money for any term of time, &c., but that no such tax should be levied or money borrowed, except in accordance with a section of the original charter, which provided that no such tax should be levied, or money be borrowed, without the consent of a majority of the voters who should vote upon the question at a special election to be held for that purpose. Afterwards the city of Kenosha subscribed \$150,000 to the stock of the Kenosha & Beloit Railroad Company, in pursuance of the vote of a majority of the legal voters of said city, and issued scrip to the amount of \$65,000 in part payment therefor, and levied a tax to provide for the payment of said scrip. In a suit by a tax-payer in said city, to restrain the collection of said tax, it was *held*, that said amendment to the charter of said city was in conflict with section 3 of Article XI of the constitution; that the act of the city council in creating said debt, was unauthorized; and that the collection of said tax should be restrained. *Ibid.*

22. Whether it follows that the scrip so issued

is void, the court does not, in this action, determine. *Ibid.*

23. An ordinance of the city of Milwaukee, in pursuance of its charter, forbidding under a penalty of not less than five, nor more than ten dollars, the exposing of any load of hay for sale in certain wards without having such load weighed by the attendant of an established and sealed city hay scale, and obtaining from him a certificate of the weight, (paying therefor a fee of twelve cents), is not repugnant to the constitution of this state. *Fales v. City of Milwaukee*, 678

CONTINUANCE.

See AMENDMENT, 8.

CONTRACT.

See EQUITY, 8.

1. A party who procures an insurance upon his own life, at his own expense, for the benefit of his infant child, as an intended gratuity or voluntary provision for such child, and afterwards becomes unwilling or unable to keep up the policy by paying the required premiums, may, while the policy still remains in his own possession, transfer the same by delivery, with the assent of the insurance company, to a third person, to be kept up by him for his own benefit, he agreeing to pay the premiums thereon. *Clark v. Durand*, 223

2. In an action by such infant against such assignee, to recover the money paid to the latter by the insurance company upon the death of the party whose life was assured, such assignee having kept up the policy until that time at his own expense, it was *held*, that the infant could not recover, although it appeared that the assignee, at the request of the parent, had signed the declaration made prior to such insurance and on which the same was based, as guardian for the infant, (though never legally appointed as such), and was described in the policy as such guardian, and had signed a receipt as such guardian, for the money paid to him by the insurance company. *Ibid.*

3. In executory contracts to furnish articles for a specific purpose, especially by manufacturers, there is an implied warranty that the articles delivered shall answer the purpose for which they were designed. *Fisk v. Tank et al.*, 276

4. In case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning it or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have such damages allowed to him, by way of recoupment, from the sum stipulated to be paid. *Ibid.*

5. The dictum in *Gatty v. Rountree*, 2 Chandler, 28, that where there is a warranty but no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid, and that in such case his only remedy is by suit for damages, or by recoupment in case he is sued for the purchase money, is commented upon in this case. *Ibid.*
 6. Where a contract to furnish and put up engines suitable for a certain boat, contained a stipulation, that if the work should prove defective or fail, on a trial of twenty days, to answer the purposes intended, it should be made good by repairs of defects, the right of the purchaser to recover damages on account of such defects does not depend upon his returning, or offering to return, the articles furnished. *Ibid.*
 7. Under such a contract, the right of the vendor or manufacturer to repair the defects was limited to such defects as disclosed themselves within the twenty days allowed for such trial. *Ibid.*
 8. Where the plaintiff in a suit on such contract offers proof tending to show that the machinery, when put in operation, did not answer the purpose for which it was intended, the defendants have a right to meet that proof by evidence that it was the weakness of the boat, and not their unskillful workmanship, which caused the failure in the operation of the machinery. *Ibid.*
 9. A stipulation in such contract to furnish "machinery adapted to, and suitable for the boat, and that would drive her from 12 to 15 miles per hour," does not import any warranty, by the vendors, of the strength and capacity of the boat to endure the weight, shocks, and friction of the machinery when in motion, but an obligation only to furnish machinery adequate to run a boat of such size and dimensions at the proposed speed, the purchaser taking the risk whether the boat is sufficiently strong for such machinery. *Ibid.*
 10. If the machinery furnished under such contract was not delivered as soon as the contract required, and then proved defective and inadequate for the purpose, after the trial provided for in the agreement, and the vendors refused to make the repairs necessary to adapt the machinery to the purpose intended, the rule of damages is the difference in value between the machinery furnished and that called for by the contract, adding thereto the expenses which the vendee has actually incurred in his business as a consequence of the failure of the defendants to perform their contract, which would include the wages and board of the officers and crew for the time they necessarily remained idle during the delay in furnishing the machinery, and during the time lost by breakages while testing the same, and during such reasonable time as was required for repairing it, or for procuring new and suitable machinery in its stead, if necessary, to which also may be added interest. *Ibid.*
 11. Where a person entered into a contract with the corporate authorities of a city, to fill up a lot, &c., in said city, and subsequently made an agreement with the owner of the lot to do the work for him, and receive payment therefor upon delivering to him the street commissioners' certificate for such work: *Held*, that such agreement was valid. *Gee v. Swain*, 450
 12. The commissioners of school and university lands made an order for the publication of the list of forfeited lands for a certain county, in a newspaper published therein by A, and notified A of said order, and requested him to do the work, but after such notice and request, a majority of the commissioners made and entered upon their book another order, directing the publication of said list in another paper, published in said county by B. No notice of the making of the second order, or of a revocation of the first, was given to A, who performed the work as directed, and received payment therefor from the state. B published the list also, under the second order, and applied for a mandamus to compel the treasurer of state to pay his account therefor, which had been audited by the proper officer: *Held*, that the commissioners could not relieve the state from its contract with A by revoking the first order, without notifying him of the withdrawal of their proposition before he had accepted it. *State ex rel. Harney v. Hastings*, 596
 13. *Held*, also, that it was not material whether A had actually notified the commissioners of his acceptance of their proposal to him, or had done any act of acceptance, before the second order was made, if he did accept their proposal within a reasonable time after it was made, and before he had any notice of its revocation. *Ibid.*
- ### CONVEYANCE.
1. Though a deed be made to a party by a wrong baptismal or christian name, the grant is good and the title vests in the intended grantee. The uncertainty as to the person of the grantee, does not, in such case, appear upon the face of the deed, but is caused by extrinsic evidence, and is therefore susceptible of explanation or removal by parol proof. *Stack v. Sigelkow*, - 224
 2. The title of such grantee is not affected by a deed of conveyance of the land made by a stranger in the name by which such grantee was wrongly designated, although the party receiving such deed, while knowing that the stranger was executing such deed in a name not his own, was ignorant that there was a mistake of the christian name in the first mentioned deed, and ignorantly supposed that such stranger had authority from the true owner of the land to convey the same, and

under that belief paid him the full value thereof. *Ibid.*

3. A deed need not show on its face the limits or quantity of the real estate granted, if it refers to certain known objects by which such limits may be readily ascertained. *Coats v. Tuft et al.*, 388
4. Where a deed described the land conveyed therein, as "a part of the east half of the southwest quarter of section 6, town 3, range 8, beginning on the south line of said section 5, on the east side of the bottom land of the creek, far enough up the bank to raise a nine foot head to a mill standing by the bridge on section 8, thence up the bottom land one hundred rods, to include all the bottom land on both sides of the creek, within the above mentioned bounds:" *Held*, that the deed conveyed the bottom lands on each side of the creek for the distance of one hundred rods up the same from the place of beginning, which would be flowed by a nine foot head of water at the mill therein referred to, but did not grant a right to flow any lands of the grantor lying beyond the distance of one hundred rods in that direction, although such lands would be flowed by a nine foot head of water at the mill. *Ibid.*

COSTS.

See PRACTICE, 3. WITNESS FEES.

COUNTER CLAIM.

- A counter claim, unless denied, is admitted. *Moyer v. Gunn.* 385

COUNTY COURT.

See JURISDICTION, 3, 4.

COUNTY ORDERS.

1. All moneys belonging to a county as such, and not held by it in trust, constitute one fund, out of which all its liabilities are to be paid. *Montague v. Horton.* 599
2. Where a county order which directed the treasurer of the county to pay the amount thereof "out of the unappropriated money belonging to said county for jail purposes," had been duly presented for payment: *Held*, that the owner was entitled to payment thereof out of any funds belonging to the county, prior to the payment of any county orders subsequently presented. *Ibid.*
3. A person who holds a county order, is a mere creditor *at large* of the county, and until judgment is rendered thereon, and execution returned unsatisfied, cannot, by injunction or otherwise, disturb the county in the exercise of its general right to dispose of its property. *Ibid.*

CORPORATIONS.

See CITIES. RAILROADS.

1. Where a contract is made with a corporation by a wrong name, a suit may be maintained thereon by an assignee of the contract, the complaint alleging that the contract was made with the corporation by such wrong name. *Racine Co. Bank v. Ayers.* 512
2. The complaint in a suit brought in a corporate name, need not aver the plaintiff to be a corporation. *Central Bank of Wisconsin v. Knowlton et al.*, 624
3. It is not necessary in a pleading to aver that a corporation whose name only has been changed, retains, under its new name, its former rights. *Kimball v. Spicer.* 665

CRIMINAL LAW.

1. The caption of an indictment was as follows: "At a term of the circuit court for the county of Portage in the state of Wisconsin, begun and held at the court house, in the village of Plover, in the county of Portage aforesaid, (stating the time when, and the judge by whom said term was held), the jurors for the grand jury for the state of Wisconsin aforesaid, good and lawful men, duly summoned, empanelled, tried and sworn, inquiring in and for the body of the county of Portage aforesaid, on their oaths aforesaid, do present:" *Held*, that it was sufficient. *Benedict v. The State.* 313
2. Where a defendant in a criminal action has any exception to take to the proceedings on his trial in the circuit court, arising out of any matter which does not regularly appear in the record, he should make and file his bill of exceptions, which, being allowed by the judge, becomes a part of the record, or, if it be a proper case for a report to this court, under the statute, should see that such exceptions are embodied therein; otherwise this court cannot judicially know that such matters of exception exist. *Ibid.*
3. Every judgment or sentence of imprisonment in the state prison, must direct that the convict be punished by confinement at hard labor, and also by solitary imprisonment (for such term as the court shall direct, not exceeding twenty days at one time); and if the sentence is silent as to such hard labor or such solitary imprisonment, it is erroneous. *Ibid.*
4. A statement in the record that the court gave the prisoner the following sentence, "That you now be remanded back to jail, and that the sheriff do convey you to the state prison, and then and there to be confined during your natural life," purports to be merely a memorandum by the clerk of the language addressed by the judge to the defendant, and cannot be received as the record of the judgment of a court in a criminal proceeding. *Ibid.*

5. In such a case, the proper practice is for the appellate court to remit the record to the court below, with a direction that it proceed to give judgment upon the conviction according to law. *Ibid.*
6. Where one of the counts in an indictment, otherwise in due form, charged that the defendant "did suffer games at cards to be played for gain, by means of cards, then and there used as a gaming device, in his house, &c.;" and another count, otherwise in due form, charged that the defendant "did suffer the games of euchre and poker at cards, and with and by means of cards, then and there used as a gaming device, to be played for gain in his house, &c.;" *Held*, that such counts were good, under section 4 of chapter 117 of the General Laws of 1858. *State v. Lewis*, 434
7. The statute does not authorize the judge of a circuit court to *report* a case to the supreme court for its decision of a question of law arising therein, unless the person on whose trial such question arose was *convicted* of an offense. *State v. Knife* *et al.*, 439
8. The objection that one of the grand jurors who found an indictment, was an alien, cannot be taken advantage of after a plea to the merits, although the disqualification was not known to the defendant until after such plea was filed. *Byrne et al. v. The State*, 519
9. The words "any person not having all the qualifications of an elector," as used in sec. 42, chap. 169, R. S., 1:54, mean any person *disqualified, incapacitated or disentitled* to vote, from any of the causes fixed by law, and refer to the condition of the person at the time his vote is received. *Ibid.*
10. It is not necessary, in an indictment against inspectors of an election, under the above section, to aver that the person from whom the vote was received, did not take the oath prescribed by section 36 of chap. 7. *Ibid.*
11. A count in an indictment charging that the inspectors of an election did knowingly receive, and sanction the reception of, an illegal vote, is not objectionable for duplicity. Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense. *Ibid.*
12. Whether a person offering to vote has a wager depending upon the result of the election, is a mixed question of law and fact, in passing upon which the inspectors act in a *quasi* judicial capacity, and if they discharge that duty in good faith to the best of their ability, they are not criminally responsible for an error of judgment or mistake of law. *Ibid.*
13. To sustain an indictment against a person charged as an accessory before the fact to the commission of a felony, it is necessary for the state to establish the guilt of the principal felon, as well as that the defendant was an accessory; and confessions of the principal that he committed the crime, are not admissible as evidence of his guilt, upon the trial of the accessory, such confessions being, as to the latter, only hearsay. *Ogden v. The State*, 532
14. This Court cannot take notice of proceedings had upon the trial of a criminal action, although the minutes of them, as taken by the clerk or judge, are returned by the clerk as a part of the record. They must be embraced in a bill of exceptions in order to become a part of the record or be entitled to notice. *Peglow v. The State*, 534. *Same point, Frans v. The State*, 555
15. A statement in the record in these words, "Prisoner in court, and sentenced by the court as follows: That the said F— P— be sentenced to state's prison," &c., purports to be merely a recital or memorandum by the clerk, and cannot be regarded as the record of a judgment of a court. *Peglow v. The State*, 534
16. If a sentence of imprisonment in the state prison omits to direct that the convict be punished by confinement at hard labor, it is erroneous. *Ibid.*
17. In such a case this court remits the record to the court below, with a direction that it proceed to give judgment upon the conviction according to law. *Ibid.*
18. A sentence in these words, "The court sentences the prisoner as follows: that the said F— F— be punished by confinement in the state prison," &c., though lacking in formality, purports to be the judgment of the court, and is sufficient. *Frans v. The State*, 534
19. The statute which provides that where a mortal wound shall be given in one county, by means whereof death shall ensue in another, the offense may be prosecuted in either county, is not in conflict with that provision of the constitution which secures to a person accused the right to a trial by a jury of the county or district wherein the offense was committed. *Dixon, C. J., dissenting. The State vs. Pauley*, 557
20. Where a mortal blow is struck in one county, and death ensues therefrom in another, that court, in either county, which first takes cognizance of the offense, has exclusive jurisdiction thereof, and no other court can acquire any jurisdiction of it, except by a change of venue as provided by statute. *Dixon, C. J., dissenting*, *Ibid.*
21. The presumption of guilt arising from the unexplained possession of property recently stolen, is one of fact and not of law, nor of law and fact combined. *Graves v. The State*, 591

22. The force of such presumption is not affected by the fact that the line between two states intervenes between the place where property was stolen and that where it was found immediately afterwards, in the unexplained possession of the person indicted for the theft.

Ibid.

23. A conviction for larceny will not be reversed because the court instructed the jury that such presumption was one of *law*, when it does not appear that the attention of the judge was called to the form of the expression adopted by him, or that any specific instruction on that point was asked by the counsel for the prisoner.

Ibid.

24. The record in this case not purporting to contain *all* the charge given to the jury, this court may presume that, in omitted portions of it, the circuit judge properly explained the nature of the presumption, leaving the jury to determine its force.

Ibid.

D

DAMAGES.

1. In a suit by A to rescind a contract made by him with B, for the purchase of B's half of certain school land certificates which had been bought by them jointly, and which were, after the making of such contract, discovered to be void, it was *held* that if in the meantime A had acquired a good title to the lands by buying outstanding valid certificates therefor, at a less price than he had agreed to pay B for the invalid ones, the proper measure of relief would be the deduction of one-half the sum paid by A to perfect his title, from the amount of the purchase money agreed to be paid by him to B. *Hurd v. Hall*, 112

2. In case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning it or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages; or if sued for the price, may set up and have such damages allowed to him, by way of recoupment, from the sum stipulated to be paid. *Fisk v. Tunk et al.*, 276

3. Where a contract to furnish and put up engines suitable for a certain boat, contained a stipulation, that if the work should prove defective or fail, on a trial of twenty days, to answer the purposes intended, it should be made good by repairs of defects, the right of the purchaser to recover damages on account of such defects does not depend upon his returning, or offering to return, the articles furnished.

Ibid.

4. If the machinery furnished under such contract was not delivered as soon as the contract required, and then proved defective and inadequate for the purpose, after the trial provided for in the agreement, and the vendors

refused to make the repairs necessary to adapt the machinery to the purpose intended, the rule of damages is the difference in value between the machinery furnished and that called for by the contract, adding thereto the expenses which the vendee has actually incurred in his business as a consequence of the failure of the defendants to perform their contract, which would include the wages and board of the officers and crew for the time they necessarily remained idle during the delay in furnishing the machinery, and during the time lost by breakages while testing the same, and during such reasonable time as was required for repairing it, or for procuring new and suitable machinery in its stead, if necessary, to which also may be added interest.

Ibid.

5. *It seems* that in trover for deeds or other evidences of title to land, where the *title* itself is unaffected by the conversion, and the deed or other instrument has been lost or destroyed through the defendant's mistake or slight negligence or omission, the proper measure of damages would be, such sum as would recompense the plaintiff for any actual loss he may have sustained, and for his trouble and expense in going into a court of equity or elsewhere, to establish and perpetuate the evidence of his title; but if it should appear that the taking or destruction was wanton or malicious, or that the defendant still possessed the deed, and stubbornly or vexatiously refused to surrender it, the jury might give such further damages, by way of punishment to the defendant, or in order to compel the return of such deed, as in their judgment the circumstances might require. *Per* Dixon, C. J. *Mowry v. Wood*, 413

DECEDENTS, ESTATES OF.

1. The remedy provided by chapter 101 of the Revised Statutes of 1855, for creditors having claims against the estates of deceased persons, is exclusive in its character. *Price v. Dietrich*, 626

2. No action can be maintained upon a claim which has been allowed by the county judge, or by the commissioners appointed by him to examine and adjust claims against the estate of the deceased, in accordance with the statute, unless, after an order of distribution has been made by the county judge, the administrator refuses or neglects to pay according to the order, in which case he becomes personally liable.

Ibid.

3. The allowance of a claim by the county judge, or by said commissioners, has the force and effect of a judgment.

Ibid.

DEPOSITION.

1. *It seems* that the deposition of a witness taken in this state is not admissible in evidence, if the certificate of the officer before whom it

was taken, states as the only reason for taking it, "that the deponent is going out of the state," although the party offering the deposition testifies on the trial that the witness was still absent from the state. *Robbins v. Lincoln*, 1

2. A deposition should not be suppressed or excluded for want of a venue or statement of the place where it was taken, either in its caption or in the certificate of the commissioner before whom it was taken. *Fisk v. Tank et al.*, 276

3. It is no objection to a deposition that it was reduced to writing by the deponent instead of the commissioner before whom it was taken. *Ibid.*

4. A copy of a contract between the deponent and one of the parties to the suit, annexed to a deposition as an exhibit, is not admissible in evidence against such party, unless the non-production of the original is sufficiently accounted for; but the exhibit may be rejected, and the testimony of the witness as to other matters be received. *Ibid.*

5. It is a general rule, that depositions reduced to writing by the deponent, or by a party to the suit, or some third person, in advance of the examination before the proper officer, or copied from such previously written statement, must be rejected; but where the deponent is a party defendant to a suit, with the fact of partnership between him and the other defendant admitted by the pleadings, a paper signed by him, and annexed to his deposition, as containing a correct statement of a verbal contract made between such partnership and the plaintiff, may properly be received in evidence as an admission in writing by one of the partners, of the terms of such contract, although it appear that such paper was written by the plaintiff, and sent to the witness before his examination; that fact, at most, only going to the credit of the witness. *Ibid.*

DISMISSAL OF ACTIONS.

1. Where the mortgagees of a railroad commenced a suit for the foreclosure of their mortgage, and obtained an order appointing a receiver to take possession of the road, &c., and an appeal was taken from the order by the company and others in possession of the road, and the proceedings in the circuit court stayed by the execution of a proper undertaking, and, before the decision of such appeal in this court, said mortgagees directed the clerk of the circuit court to enter a discontinuance of the foreclosure suit, and served a copy of the order of discontinuance upon the defendants in that suit, with notice that the suit was discontinued at the plaintiffs' costs, and offered to pay the defendants all their costs upon presentation of a taxed bill thereof, and also to appear before any taxing officer, at such time as the defendants might designate, to attend to the taxation of the same, and stipulated in said notice that the order of the circuit court appointing a receiver, from

which said appeal had been taken, might be rescinded and cancelled at the plaintiffs' costs, and also offered to pay the costs of the appeal upon presentation of a taxed bill thereof: *Held*, that even if the circuit court still retained jurisdiction of the case, so that it might make an order therein for the protection of the rights of all the parties (a question this court does not decide), still the plaintiffs therein could claim no further benefit from such suit, but must go out of that court upon such terms as the court might see fit to impose. *Spaulding v. Milwaukee & Horicon Railroad Company*, 607

2. *Held*, also, that the appeal to this court would fall upon the discontinuance of said suit in the circuit court, and that an application of the company to this court for an injunctive order, forbidding certain persons who had, after said appeal, obtained possession of the road and were operating it by virtue of certain legal proceedings in the U. S. District Court, from interfering with or exercising any control over said road, could not be granted. *Ibid.*

E

ELECTIONS.

See CRIMINAL LAW, 8, 9, 10, 11, 12.

1. An act of the legislature authorized the voters of a county to decide by ballot whether a part of its territory should be annexed to an adjoining county. On the hearing of an alternative mandamus, sued out to compel the register of such adjoining county to record a deed for land situate in the territory whose annexation was the subject of such vote, it was *held*, that the register, in deciding whether his duty required him to record the deed, might rely upon the official canvass of the votes given at such election; but that such official canvass was not *conclusive*, and the relator might impeach its correctness. *State ex rel. Spaulding v. Elwood*, 551

2. The act referred to, provided that at said election the electors might express their choice by voting "For detaching R—," or "Against detaching R—," on separate ballots, to be deposited in a box used for such ballots only: *Held*, that a return to such writ of mandamus, stating that at said election a majority of the legal votes cast upon said question, was "Against detaching R—," and specifying the whole number of votes cast, and the number which were cast "For detaching R—," and the number which were cast "Against detaching R—," was sufficiently certain and specific to inform the relator of the respondent's ground of defense. *Ibid.*

3. *Held*, also, that separate poll lists should have been kept, of all persons voting upon that question at said election, but *held, further*, that the votes of certain towns, in which no such separate poll list was kept, should not,

for that reason, be rejected, but that the real will of the electors, as expressed by their ballots, should be carried into effect, notwithstanding such informality or neglect of duty on the part of the officers conducting said election. *Ibid.*

4. *Held, further*, that the expressions in said act as to the form of the ballots, were not imperative, and that certain ballots which were cast at said election for "R—attached," for "R—detached," "For division," and "Against division," and which were counted by the canvassers as they supposed them to have been intended, should not be rejected because not in the form prescribed by the act, but that when the intention of a voter can be clearly ascertained from the ballot itself, with the aid of extraneous facts of a public character connected with the election, such intention should have effect, and the vote be counted accordingly. *Ibid.*

5. An act of the legislature authorized the electors of a certain county to vote, at the annual election on the first Tuesday in April, upon the question of the removal of the county-seat of said county, and provided that the votes cast upon that question at such election should be canvassed, &c., by the same officers and at the same time and in the same manner provided by law for canvassing, &c., the result of elections for state or county officers, and that such result should be reduced to writing by the canvassing officers, and certified by them to be true and correct, and recorded by the clerk of the board of supervisors in a county record book in his office. *Held*, that the legislature intended that the votes cast upon said question at such election should be canvassed by the county board of canvassers, on the Tuesday following said election, when the votes for chief justice were canvassed. *State ex rel. Gates v. Fetter*, 566

6. An alternative mandamus, sued out to compel the clerk of the circuit court of said county to keep his office at A—, alleged that at such election a majority of the votes cast upon the question was in favor of the removal of the county-seat to A—, but that the board of canvassers had refused to count the votes of certain precincts in said county, which had given a majority of 157 votes in favor of such removal, on account of alleged defects in the returns of the votes cast therein, and had canvassed the votes of the remaining towns or precincts, and certified that a majority of 86 votes had been cast at said election against such removal. The return to the writ admitted that the board of canvassers had refused to count the votes of certain precincts, as stated in the writ, on account of defects in the alleged returns of the votes therein, but insisted that, inasmuch as the board of canvassers had made their certificate, as required by said act, showing that a majority of the votes cast upon said question at said election was against such removal, and such certificate had been recorded by the clerk of the board of supervisors, as in said act required, the re-

spondent could not lawfully remove his office, &c. *Held*, on demurrer, that the return was, in effect, an admission of the incorrectness of the certificate of the board of canvassers, and that a peremptory mandamus should be awarded for the removal of said office to A—. *Ibid.*

EQUITY.

See COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USES, 3, 7. MORTGAGE OF REAL ESTATE, 1. PARTNERSHIP, 1, 2, 3, 4.

1. A bill in equity, for the purpose of obtaining a new trial of an action at law, or enjoining the collection of the judgment therein, was properly dismissed by the court, where no evidence was produced, showing, or tending satisfactorily to show, that the complainants had a *good defense* to the action at law, or that the judgment was contrary to equity; although it appeared that the action at law was improperly brought to trial by the plaintiff therein, in violation of a known verbal agreement between the attorneys on both sides for its postponement, whereby the defendants in such action, and their attorneys, were prevented from being present at the trial, or offering any evidence in support of their plea to such action. *Ableman et al. v. Roth et al.*, 81

2. As to the amount of proof which should be required, to show that injustice has been done by a judgment so obtained, the same rule should prevail in a proceeding in equity for a new trial merely, which prevails in a court of law. *Ibid.*

3. In 1854 A and B made an entry, at the office of the commissioners of school and university lands, of lots 118, 120, 121 and 122, of a certain section No. 16, in Rock county, and received certificates therefor, and also purchased from the holders two certificates issued by said commissioners in 1850, for lots 117 and 123 in the same section, and a certificate issued by said commissioners in 1853, for lot 116 in the same section. The certificates for lots 117 and 123 were valid; but all the other certificates were *void*, for the reason that the lots therein mentioned had been sold by said commissioners, in 1850, to other parties, and were again sold by them in 1853 and 1854, at private sale, on account of the non-payment of interest, without first having been offered for resale at public auction, as required by law. Shortly afterwards A purchased from B his interest in all said certificates, and took an assignment of such interest at the price of \$30 per acre for one-half of the land, after deducting the amount due to the state, both parties supposing, at the time of such assignment, that all said certificates were valid, and A, although he knew that said lands had been sold by said commissioners in 1850, being ignorant whether said lands had been offered for resale at public auction or not: *Held*, that A's ignorance that said lands had not been offered for resale at public auction by said com-

- missioners, was such a mistake or ignorance of fact, as gave him a right in equity to a rescission of the contract. *Hurd v. Hall*, 112
4. DIXON, C. J., was of opinion that A could maintain his action for a rescission of the contract, on the grounds, also, of an implied warranty in the assignment of said certificates, that the same were valid, and of a failure of consideration for the money paid, or agreed to be paid to B, in that the instruments assigned were not school land certificates, as they purported to be. *Ibid.*
 5. *Held*, also, that if, in the meantime, A had acquired a good title to all said lands, by buying the outstanding valid certificates, at a less price than he had agreed to pay B for the invalid ones, the proper measure of relief would be the deduction of one-half the sum paid by A to perfect his title, from the amount of the purchase money agreed to be paid by him to B. *Ibid.*
 6. A statement in a bill of revivor that the complainants therein are the heirs at law of the complainant in the original bill, who has died intestate, is a sufficient allegation of heirship, without a more minute statement of the facts which show them to be such heirs. *Gillet et al. v. Robbins*, 819
 7. A statement upon oath of the defendant, in his answer to a bill in equity, may be overcome by the testimony of two or more witnesses, to admissions of the defendant inconsistent with such statement. *Ibid.*
 8. A bill for specific performance of a contract is addressed to the sound discretion of the court, and a contract, to be enforced, must be fair, just and certain, and founded on an adequate consideration, and if deficient in either of these requisites, a court of equity will not enforce it. *Smith et al. v. Wood et al.*, 882
 9. A and B entered, at the U. S. land office, forty acres of land, upon a part of which C and D had been mining and taking out lead ore, the two latter having also purchased of one E another part of said tract for \$2,500—neither C, D nor E having any right to said land or the ore therein. After A and B made their entry, C and D claimed the land, representing that their diggings, and the lot bought of E, were included within such entry; and A and B then executed their bond to convey the land to C and D upon obtaining a patent for it, if it should appear that the lot bought of E was situate thereon. The patent having been obtained, and it appearing that the lot purchased of E was situate upon the land, C and D filed a bill for a specific performance of the contract: *Held*, that the bond was without any consideration, and although under seal, could not be enforced. *Ibid.*
 10. Sundry persons subscribed sums varying from fifty cents to ten dollars, for the purpose of assisting the members of an unincorporated musical association to erect a building for their use as a band. With these and other funds, donated to or furnished by the members, a frame building was erected by the band on ground belonging to A, (who was one of said subscribers, and also one of the band), under a lease for two years, which stipulated that the leasees, or a majority of them, might remove it at any time during said term. About a year after the building was erected, the association disbanded, and B, (one of the twelve persons who had composed the band), purchased the interest of nine of the other members in the building, and threatened to remove it. In an action by A and several other of said subscribers for an injunction against such removal of the building: *Held*, that such subscriptions were absolute gifts to the members of the band, and that the building so erected was a chattel owned by them, as tenants in common, which they had a right to dispose of as they thought proper. *Higgins et al. v. Riddell*, 587
 11. *Held*, also, that if A might otherwise have had a right to interfere with the disposition of the building in opposition to the wishes of B, who owned 10-12 of it, the terms of the lease precluded him from objecting to the removal of the building from his lot. *Ibid.*
 12. Before the adoption of the Code of Procedure, a court of equity would interfere, by injunction or otherwise, to restrain or control the proceedings of subordinate tribunals, or the official acts of public officers, only when such acts or proceedings affected real estate, and would lead to irreparable injury to the freehold, or to the creation of a cloud upon the title, or where they would lead to a multiplicity of suits; and the Code has not enlarged the power of such courts in this respect, except in reference to temporary injunctions during the pendency of a litigation, which may now be granted, whether the action was formerly denominated legal or equitable. *Montague v. Horton*, 599
 13. A person who holds a county order is a mere creditor *at large* of the county, and until judgment is rendered thereon, and execution returned unsatisfied, cannot, by injunction or otherwise, disturb the county in the exercise of its general right to dispose of its property. *Ibid.*

EVIDENCE.

See PARTNERSHIP, 1, 2, 3, 4.

1. Where it became necessary on a trial, for the plaintiffs to produce and offer to the defendant a certificate of the receiver of an insurance company, showing the allowance of a claim for loss of certain salt, shipped by plaintiffs to defendant, and lost in a storm, and the plaintiffs, on the trial, produced the certificate of said receiver, showing the allowance of a claim, but stating that it was for loss and damage by fire, on a marine policy, and there was some evidence before the jury tending

- to show that the certificate was the identical one issued for the loss of said salt: *Held*, that the recital in the certificate as to the cause of the loss, was not conclusive evidence that the claim certified to did originate in a loss by fire, and an instruction to that effect, asked for by the plaintiffs, should have been given. *Ranney et al. v. Higby*, 61
2. Parol evidence is not admissible to contradict or vary the terms of a written agreement. *Downie v. White*, 176
 3. Where an issue is made between the plaintiff in an attachment suit and a garnishee, upon the answer of the latter, it seems that such answer is never admissible in evidence on the trial of such issue; but where, under the law allowing parties to be witnesses in their own behalf, the garnishee caused his own deposition to be taken and read on the trial of such issue, there was clearly no error in excluding his answer as evidence. *Keep v. Sanderson*, 852
 4. Evidence tending to establish fraud, must be submitted to a jury in such a manner as leaves them free to determine its effect. *Gillet v. Phelps et al.*, 392
 5. The acts and statements of a vendor, before and at the time of the sale, are admissible in evidence to show his fraudulent intent. *Ibid.*
 6. The intent of the vendor of goods to hinder and delay his creditors, does not affect the title of the vendee, without proof that he had notice of that intent. *Ibid.*
 7. Where a sale of goods is sought to be impeached as fraudulent against the creditors of the vendor, facts tending to show that the vendor procured the goods from such creditors by false representations, with an intention to defraud them, and that his vendee was aware of, and had participated in, that fraudulent purpose, are admissible as circumstances from which, in connection with other evidence, the jury may infer that such sale was made in execution of the previous fraudulent design. *Ibid.*
 5. Where the vendee, before the creditors sued out their writs of attachment, offered to transfer the goods to them, if they would release him from his liabilities for debts incurred by the vendor in the purchase of the goods (such liabilities being much less than the nominal price which he had agreed to pay for the goods), evidence of such offer was properly ruled out, as not tending to establish the good faith of the sale. *Ibid.*
 2. Whether parol evidence is admissible to vary the terms of a written agreement, when the question arises between one of the parties to it and a stranger, *quære*. *Racine County Bank v. Lathrop*, 466
 10. To sustain an indictment against a person charged as an accessory before the fact to the commission of a felony, it is necessary for the state to establish the guilt of the principal felon, as well as that the defendant was an accessory; and confessions of the principal that he committed the crime, are not admissible as evidence of his guilt, upon the trial of the accessory, such confessions being, as to the latter, only hearsay. *Ogden v. The State*, 532
 11. Where a promissory note is indorsed by the payee, and also by another party, the legal inference from the instrument itself, is that the payee is the first indorser, but parol evidence is admissible to prove the circumstances attending the indorsement by such other party, which may give him the character of a prior indorser in respect to the payee. *Cady v. Shepard*, 639
- ### EXCEPTIONS.
1. Where a defendant in a criminal action has any exception to take to the proceedings on his trial in the circuit court, arising out of any matter which does not regularly appear in the record, he should make and file his bill of exceptions, which, being allowed by the judge, becomes a part of the record, or, if it be a proper case for a report to this court, under the statute, should see that such exceptions are embodied therein; otherwise this court cannot judicially know that such matters of exception exist. *Benedict v. The State*, 818
 2. A judgment will not be reversed on account of the refusal of the court to grant a new trial, unless the refusal was excepted to. *Webster v. Modlin et al.*, 868
 3. Where the record does not show that such exception was taken, the affidavit of counsel will not be received to supply the defect, especially while the judge before whom the trial was had, is living. *Ibid.*
- ### EXECUTION.
- See PAYMENT, 3.
SUPPLEMENTARY PROCEEDINGS, 1.
- ### FAILURE OF CONSIDERATION.
- See EQUITY, 3.
- Where one partner, without the consent of his copartner, mortgaged an undivided half of certain partnership property, to secure his own separate debt, and a third party purchased such property, and promised to pay the mortgagee one-half its value, but was afterwards compelled to pay the full value thereof as garnishee, under an attachment sued out by a creditor of the firm, it was *held*, that the consideration of his promise to pay the mortgagee had wholly failed, and the promise could not be enforced. *Sauntry v. Dunlap*, 264

F

FINDING.

See AMENDMENT, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.

FOREIGN LAW.

1. The courts of this state will not take judicial notice of the laws of other states, but in the absence of any proof to the contrary, will presume them to be in accordance with our own. *Walsh v. Dart*, 635
2. By the law of this state bills payable at sight are entitled to three days of grace, and in a suit in a court of this state against the indorser of such a bill, payable in the state of New York, the court must presume, unless there is proof to the contrary, that the bill was entitled to days of grace by the law of that state, and hold that a protest of such bill for non-payment on the day it was first presented to the drawees, was premature and insufficient to charge the indorser. *Ibid.*

FRAUDS, STATUTE OF.

See PARTNERSHIP, 1, 2, 3, 4.

FRAUDULENT SALE.

See PLEADINGS, 6.

1. Where, in an action by the vendee of goods against creditors of the vendor, who had seized the goods under writs of attachment, as the vendor's property, evidence had been given of facts tending to show that the sale was fraudulent as to creditors, an instruction to the jury that such facts, if proven, "were evidence of fraudulent intent," was liable to be understood by the jury as meaning that such facts, if proven, were sufficient evidence of such intent, and was, therefore, calculated to mislead them. *Gillet v. Phelps et al.*, 392
2. An instruction to a jury, "that the terms of a sale [which was partly on a credit of one and two years] were in part calculated to hinder and delay creditors; that the law presumes a man to intend that which must naturally be the consequence of his acts; and that if they were satisfied that at the time of the sale the vendee had knowledge of the insolvency of the vendor, then his purchase was fraudulent as against such creditors," was erroneous, because it was liable to be understood as declaring that the vendee must be presumed to have intended to delay the creditors of the vendor, if such was the effect of his purchase, although it should not appear that he knew that the vendor was insolvent; and because the facts referred to in the instruction, although indicative of a fraudulent intent, should

have been submitted to the jury, to be considered by them, in connection with all the other evidence, in determining the intent of the parties. *Ibid.*

3. Evidence tending to establish fraud, must be submitted to a jury in such a manner as leaves them free to determine its effect. *Ibid.*
4. The acts and statements of a vendor, before and at the time of the sale, are admissible in evidence to show his fraudulent intent. *Ibid.*
5. The intent of the vendor of goods to hinder and delay his creditors, does not affect the title of the vendee, without proof that he had notice of that intent. *Ibid.*
6. Where a sale of goods is sought to be impeached as fraudulent against the creditors of the vendor, facts tending to show that the vendor procured the goods from such creditors by false representations, with an intention to defraud them, and that his vendee was aware of, and had participated in, that fraudulent purpose, are admissible as circumstances from which, in connection with other evidence, the jury may infer that such sale was made in execution of the previous fraudulent design. *Ibid.*
7. Where the vendee, before the creditors sued out their writs of attachment, offered to transfer the goods to them, if they would release him from his liabilities for debts incurred by the vendor in the purchase of the goods (such liabilities being much less than the nominal price which he had agreed to pay for the goods), evidence of such offer was properly ruled out, as not tending to establish the good faith of the sale. *Ibid.*

G

GARNISHEE.

See ATTACHMENT, 2, 4.

H

HABEAS CORPUS.

Where a petition for a *habeas corpus* alleges that the petitioner is confined in jail on an execution against his person, which was issued irregularly, or in an action in which the petitioner was not liable to arrest, the return of the jailer is sufficient, if it shows that the petitioner is held by virtue of an execution against his person, which is valid upon its face, and which is produced and a copy of it annexed to the return; and the petitioner should allege, by way of answer or avoidance, any facts which would show that the imprisonment, though apparently lawful, is really not so. *In re Mowry*, 52

HOMESTEAD.

See **MARRIED WOMEN**, 1, 2.

The assignment by a married man of a lease of a lot, and his sale of the dwelling house on the lot, occupied by him as a homestead, are not within the disability imposed upon the husband, by section 24 of chapter 134 of the Revised Statutes of 1858, in respect to the alienation of a homestead without the signature of the wife. *Platto v. Cady*, 461

HUSBAND AND WIFE.

See **MARRIED WOMAN**.

I

IMPRISONMENT ON CIVIL PROCESS.

Upon a judgment for damages for the wrongful and fraudulent misapplication and conversion of school land certificates, deposited as security for a loan, an execution against the person may be issued, after the return of an execution against property, unsatisfied in whole or in part. The defendant in such a case is not entitled to exemption from imprisonment under section 16 of Article I of the constitution of this state, which provides that "no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied." *In re Mowry*, 52

INJUNCTION.

See **COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USES**, 8, 7.
CITIES, 10.
EQUITY, 1, 10, 11, 12, 13.

INSTRUCTIONS TO JURY.

See **ACCOUNT**, 3.
CRIMINAL LAW, 23, 24.
FRAUDULENT SALE, 1, 2, 3.
INSURANCE AGAINST FIRE, 1.
PAYMENT, 2.

INSURANCE AGAINST FIRE.

1. In an action upon a fire policy, the court refused to instruct the jury that any increase of the risk after the insurance was effected, by means within the control of the assured, rendered the policy void; the policy containing an express condition to that effect, and there being some evidence tending to show a breach of the condition: *Held*, that the instruction should have been given. *Dodge Co. Mutual Ins. Co. v. Rogers*, 837

2. Where the application for a fire policy con-

tains a question to be answered by the applicant, as to the mode in which the building offered for insurance is to be occupied, and the agent of the insurance company is informed by the applicant of the intended mode of occupation, but fills out the application without inserting any answer to that question, the company, by issuing the policy without such answer, waives it, and cannot afterwards object to any use of the premises of which the agent was fairly notified. *Otherwise*, where the agent has knowledge only that the building has been at some previous time used for a hazardous business, but does not know that it is being used in that manner at the time of the application, or that it is the custom or intention of the applicant so to use it. *Ibid*.

INSURANCE OF LIFE

See **CONTRACT**, 1, 2.

INTEREST.

See **USURY**.

J

JUDGMENT.

See **CRIMINAL LAW**, 15, 16, 18.
MORTGAGE OF REAL ESTATE, 3, 4, 18, 19
PRACTICE, 2, 3, 4.

A judgment was entered upon a note, under a warrant of attorney, which was a separate instrument, but upon the same sheet of paper as the note, and described the note correctly, except that it referred to the same as bearing even date with the warrant, while the warrant itself (which was filled up from a printed blank), was without a date: *Held*, that the judgment ought not to be vacated on the ground that the warrant did not sufficiently identify said note as the one on which judgment was authorized to be entered, it appearing that said note was the one intended to be described in the warrant.

JURISDICTION.

See **AMENDMENT**, 1.

1. The district court of the United States for the district of Wisconsin, has the power to adopt by rule, and in cases provided by law in this state, to issue, in common law actions, process of attachment against the property of debtors, as a provisional remedy, according to the form and mode of proceeding prescribed by the Code of Procedure of this state. *Adler v. Cole et al.*, 188

2. A judgment against the defendants in an attachment suit is not void for want of jurisdic-

tion, because the defendants were non-residents, and were not served with process, and because at the time of rendering such judgment the garnishee had filed an answer denying that he was indebted to the defendants, or had any property belonging to them in his possession, the issue upon which answer was then undetermined, if it appear that such issue was afterwards determined against the garnishee, and judgment rendered against him, it being the fact of the garnishee's indebtedness and not its ascertainment, which conferred jurisdiction against the principal debtors. *Keep v. Sanderson*, 352

3. A county court having civil jurisdiction, possesses the power to appoint a receiver, in a proper case, upon supplementary proceedings against a debtor, against whom a judgment has been rendered in such court. *The Second Ward Bank v. Upmann*, 499
4. Such a court has jurisdiction of all those equitable remedies which were formerly used merely in aid of a suit or judgment at law, and which, or substitutes for which, the Code has made a part of the remedy in every civil action. *Ibid.*
5. Where it appears upon supplementary proceedings, that the judgment debtor has property liable to execution sufficient to satisfy the judgment, the court has no authority to appoint a receiver. *Ibid.*
6. The statute which provides that where a mortal wound shall be given in one county, by means whereof death shall ensue in another, the offense may be prosecuted in either county, is not in conflict with that provision of the constitution which secures to a person accused the right to a trial by a jury of the county or district wherein the offense was committed. *Dixon, C. J., dissenting. The State v. Pawley*, 537
7. Where a mortal blow is struck in one county, and death ensues therefrom in another, that court, in either county, which first takes cognizance of the offense, has exclusive jurisdiction thereof, and no other court can acquire jurisdiction of it, except by a change of venue as provided by statute. *Dixon, C. J., dissenting. Ibid.*
8. The circuit court of a county has jurisdiction of a prosecution for bastardy, which was commenced before a justice of the peace of the same county, and in which the defendant was recognized to appear in such circuit court, although the complainant was, at the time of the birth of the bastard child, and of the commencement of the prosecution, a resident of another county in this state. *Owen v. The State*, 559
9. The last clause of sec. 29 of the Code, which declares that if the county designated as the place of trial in the complaint "be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant,

before the time of answering expires, demand in writing that the trial be had in the proper county," relates not only to what precedes it in the same section, but also to the preceding sections, 27 and 28, of the Code, and qualifies their meaning. If a defendant fails so to demand that the trial be had in the proper county, it may be had in the county designated in the complaint. *Pereles v. Albert et al.*, 666

10. An action was brought in the circuit court of Milwaukee county, to foreclose a mortgage on land lying in Washington county, and process was served on one of the defendants in Milwaukee county, and on the other in Washington county, where they respectively resided. The defendants did not appear to the action. *Held*, that the circuit court of Milwaukee county had jurisdiction of the action, and could render judgment of foreclosure therein. *Ibid.*

L

LANDLORD AND TENANT.

1. In an action by a lessor to enjoin the removal of a wooden building from a demise lot, situate in the city of Milwaukee, it appeared that the lot was unimproved at the date of the lease; that the building was erected by the lessee so as to be capable of removal without injury to the freehold, and that at the date of the lease and for several years before, a general custom prevailed in said city, that tenants leasing naked ground and making improvements thereon, might, in the absence of any restriction in the lease, remove such improvements at or before the expiration of the term: *Held*, that the lease in this case being silent on the subject, the parties must be presumed to have contracted with reference to the custom, and that the lessee had a right to remove the building at any time before the expiration of his term. *Keogh v. Danull*, 163
2. A stipulation in the lease, that the rent should be paid, "except in case of the destruction of the premises by accidental fire," and that the tenant should deliver up the premises at the end of the term, "use and wear thereof, and damage by accidental fire, &c., only excepted," is not regarded as being inconsistent with said usage, or as showing an intention of the parties to make a contract variant therefrom, especially as in drawing the lease, the parties used a printed form in general use, in which the stipulation referred to occurred, and the rent is of the small amount which would probably be paid for the lease of the ground. *Ibid.*
3. The lease in this case contained a covenant that the lessee would not assign it without the lessor's consent, and a stipulation that on breach of any of his covenants, the lessee should forfeit all right and title to the demised premises, and the lessor might re-enter and expel him therefrom; and it appeared

that the lessee had assigned the lease to the defendant and given him a mortgage on the building, without consent of the lessor, but the defendant was in possession of the premises at the commencement of the suit, claiming to hold under the lease, and there was no proof that the lessor had made a re-entry into the premises, or taken any steps to claim or enforce a forfeiture before bringing the suit: *Held*, that the term had not expired, and the right to remove the building remained. *Ibid*.

LIEN.

See CHATTEL MORTGAGE, 3, 5.

LIMITATIONS, STATUTE OF.

A judgment was rendered on the 14th of January, 1857, at which time the period of limitation of writs of error was four years from the date of the judgment. By an act approved April 24, 1858, the period of limitation was reduced to two years from the date of the judgment: *Held*, that a writ of error to reverse the above mentioned judgment, sued out on the 24th of October, 1859, was barred, a reasonable time for suing out the writ having elapsed after the passage of the last mentioned act, before the period of limitation prescribed therein expired. *Smith v. Puckard et al.*, 371

M

MANDAMUS.

See ELECTIONS, 1, 2, 3, 4, 5, 6.

MARRIED WOMEN.

See HOMESTEAD, 1.

1. A married woman whose husband has deserted her and ceased to support his family, and has left the state without any intention to return, cannot maintain an action to set aside an assignment, made by her husband, of a school land certificate, and to have the certificate delivered up to her by the assignee, on the ground that the assignment was procured fraudulently, for a grossly inadequate consideration, when the assignor was intoxicated and unfit to transact business, nor on the ground that the land embraced in the certificate was, at the time of the assignment, occupied by the husband and his family as a homestead, and that she refused to become a party to the assignment. *Green v. Lynden*, 404
2. If the assignment in such case is void, the wife can maintain possession of the homestead against the holder of the certificate. *Ibid*.
3. Where a woman mortgaged her land to secure the payment of her note, an answer by a subsequent purchaser of the land, in a suit to foreclose such mortgage, alleging that the

mortgagor, at the time of the execution of said mortgage and note, was a married woman living with her husband, is bad, on demurrer, although the complaint does not show the nature of the indebtedness which the mortgage was given to secure. *Dodge v. Silverthorn*, 644

4. In an action to foreclose a mortgage given by a husband and wife to secure the payment of their bond (executed by her during coverture), it is erroneous to render a personal judgment against the wife as well as the husband, for any deficiency which may remain due after the sale of the mortgaged premises, unless it is shown in the complaint that the contract related to her separate property, and was one upon which she might become liable to a personal judgment. *Rogers v. Weil et al.*, 664
5. That part of the judgment of the inferior court, which is against the wife personally for such deficiency, may be reversed, and the residue of the judgment be affirmed. *Ibid*.

MILL DAM LAW.

See AMENDMENT, 6.
PLEADINGS, 3.

MISTAKE OF FACT.

See EQUITY, 3, 4.

MONEY HAD AND RECEIVED.

See EQUITY, 3, 4.

MORTGAGE OF REAL ESTATE.

See ACTION, 9, 10, 11.
JURISDICTION, 9, 10.

1. The transfer of a note secured by a mortgage, carries with it the interest in the mortgage. *Rice v. Cribb et al.*, 119
2. A reasonable solicitor's fee, in case of a foreclosure, may be stipulated for in a mortgage, and recovered. *Ibid*.
3. A judgment of foreclosure of a mortgage, where a portion of the mortgage debt is not due, should determine the sum actually due to the plaintiff for principal and interest, and also the whole amount secured by and unpaid upon the mortgage, with interest, and should contain a provision for a stay of proceedings, in case the defendant, before the sale, shall pay to the plaintiff, or to the sheriff, the amount found due, with interest and costs. *Howe vs. English and others*, 6 Wia, 262, referred to and followed. *Ibid*.
4. The judgment in such a case should be for the whole sum secured by the mortgage and unpaid; and where the court is satisfied, from the referee's report, that the property may

- properly be sold in parcels, should direct the sale of so much thereof as may be necessary to pay the amount due with costs, &c., and should also provide that the plaintiff, upon default in the payment of any instalments of principal or interest still to become due, may, on application to the court, obtain a further order, founded on the judgment, for the sale of so much of the mortgaged premises as may be sufficient to satisfy the amount so to become due, with costs of the petition and subsequent proceedings thereon; and so on from time to time, as often as default shall happen. *Ibid.*
5. A debtor gave his note, to which was subjoined the following clause, "Having deposited with [the payee] school land certificates Nos. 112, &c., with authority to sell the same on the non-payment of this note, at either public or private sale, and apply the proceeds hereon without further notice." The note not being paid at maturity, the payee offered the certificates (which were assigned in blank) for sale at public auction, and the same were struck off and delivered to the highest bidder, for a small sum, which was credited by the payee upon the note, and the payee afterwards assigned the note to a third party, who recovered judgment thereon against the debtor, which remained unpaid. In an action brought by the debtor against the payee for a conversion of the certificates, it was held, that the deposit of the certificates under the agreement above recited, was not a pledge of personal property, but amounted to a mortgage upon the equitable estate of the debtor in the lands embraced in the certificates; that the only mode by which the creditor could enforce such mortgage, or extinguish the debtor's right of redemption, was by a suit in equity for that purpose; that the transfer of the note to such third party, carried with it the mortgage security, unless otherwise intended by the parties; that the (so called) sale of the certificates by the creditor, independently of, and without the transfer of any part of the debt, was nugatory, and such sale, and the delivery of the certificates to such bidder did not make the creditor liable to the debtor as for the conversion of the certificates, the debtor's right of redemption not being impaired thereby. and it appearing that the creditor acted in good faith, and under an innocent misapprehension of the law as to his proper remedy. *Mourry v. Wood*, 418
6. The decision in *Ainworth v. Bowen*, 9 Wis., 348, was made upon the hypothesis, assumed by counsel of both parties, that school land certificates were a proper subject of pledge, and that a sale of the certificates by the pledgee was a sale of the pledgor's interest in the land, and so far as the decision seems to sanction that doctrine, it is overruled. *Ibid.*
7. An assignment of a school land certificate in blank (i.e. where the name of the assignee is omitted), is not a transfer of the certificates at law. *Ibid.*
8. Whether equitable mortgages may be created in this state, by the deposit of title deeds, strictly so called, *quære*. *Ibid.*
9. A conveyed to B certain real estate, by an absolute deed, and B at the same time executed to A a bond, reciting that said real estate was conveyed as security for a loan of money, and binding himself to re-convey it upon the payment of the debt when it fell due; the deed and bond were recorded the day after their date, and the debt, though past due, remained unpaid: *Held*, that the bond was a good defeasance in law; that the two instruments constituted, in law, a mortgage of the property; and that A had an estate in such property, which was subject to sale on execution against him. *The Second Ward Bank v. Upmann*, 499
10. Upon the death of a mortgagor of real estate, the equity of redemption descends to his heirs, and is not barred by a sale of the land under a decree of foreclosure in a suit to which the administrator only of the mortgagor is made defendant. There was nothing in the statutes in force in the territory of Wisconsin, in 1842, to change this rule. *Stark & al v. Brown*, 573
11. A sale under such decree, will, however, operate as an assignment to the purchaser, of the interest of the mortgage in the mortgaged premises. The application of this principle is not affected by the fact, that the purchaser at such sale was one of the administrators of the holder of the mortgage, and, as such, one of the plaintiffs in the suit for its foreclosure. *Ibid.*
12. Where, after the sale to such administrator under such decree, A, in a suit for that purpose, against such administrator and the widow and heir of such holder, obtained a decree, adjudging that he was, at the time of such foreclosure suit and sale, the equitable owner of said mortgage, and was entitled to a conveyance from them of the mortgaged premises, and of all their interest therein, and quit claim deeds for said premises were accordingly executed by them to him, and he afterwards made a warranty deed for said premises to B, who made a like deed therefor to C: *Held*, in ejectment by the heirs of the mortgagor against C, that the above mentioned decree and deeds, although the latter contained no reference to the mortgage or mortgage debt, operated as a transfer to C of the interest which the mortgagee had in said premises, so that, after entry, C stood in the position of a mortgagee in possession, after default in the payment of the mortgage debt, and could not be evicted in such action. *Ibid.*
13. The owner of a school land certificate has an interest in the land described therein, which may be mortgaged. *Dodge v. Silverthorn*, 644
14. A subsequent purchaser of the certificate with notice of such mortgage, takes the land subject thereto; and the record of such mort-

gage in the register's office of the county in which the land lies, is a sufficient notice. *Ibid.*

15. If such purchaser of the certificate has paid the state the amount due thereon, he will be regarded, in a suit against him for the foreclosure of such mortgage, as having a prior lien upon said land for the amount so paid. *Ibid.*

16. Where a woman mortgaged her land to secure the payment of her note, an answer by a subsequent purchaser of the land, in a suit to foreclose such mortgage, alleging that the mortgagor, at the time of the execution of said mortgage and note, was a married woman living with her husband, is bad, on demurrer, although the complaint does not show the nature of the indebtedness which the mortgage was given to secure. *Ibid.*

17. A railroad company, engaged in constructing a railroad, to secure the payment of money borrowed for that purpose, gave a mortgage, by which they granted to the party of whom the loan was obtained, all their railroad, with its superstructure, track, and all other appurtenances, made or to be made, and all the right and title of the said company to the land on which said railroad was and should be constructed, together with all rights of way then acquired, or thereafter to be acquired by the said company, and including the depots, engine houses, shops, and other constructions at the termini and along the line of said railroad, and the parcels of ground on which the same were or should be erected, and all the land which should be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences and structures thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of the said company in, to, and concerning the same. *Held*, that said mortgage did not create any lien, as against a subsequent mortgage creditor, upon a tract of 245 acres of wood-land, afterwards acquired by the company, situate seven miles from said railroad, although said land was purchased and used by said company for the purpose of supplying said road with timber and fuel. *Dismore v. The Racine & Mississippi Railroad Co.*, 649

18. In an action to foreclose a mortgage given by a husband and wife to secure the payment of their bond (executed by her during coverture), it is erroneous to render a personal judgment against the wife as well as the husband, for any deficiency which may remain due after the sale of the mortgaged premises, unless it is shown in the complaint that the contract related to her separate property, and was one upon which she might become liable to a personal judgment. *Royce v. Weil et al.*, 664

19. That part of the judgment of the inferior court, which is against the wife personally for such deficiency, may be reversed, and the residue of the judgment be affirmed. *Ibid.*

N

NEW TRIAL.

See EQUITY, 1, 2.
PRACTICE, 46.

NOTICE.

See MORTGAGE OF REAL ESTATE, 14.
PLEDGE, 1, 2, 3.

P

PARTIES.

See ACTION, 11.
CHATTEL MORTGAGE, 1.
COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE, 2.

A complaint averred that the written promise sued upon had been assigned by the promisee to the plaintiff, who thenceforth continued "to hold, own and possess the same for the benefit of" a certain bank, and was entitled to the sum due "for the benefit of" said bank. *Held*, on demurrer, that the plaintiff was entitled to bring the action in his own name, as a trustee of an express trust. *Kimball v. Spicer*, 668

PARTNERSHIP.

1. Where it was stipulated, in a written agreement for a mercantile copartnership, entered into in March, 1833, "that a lot should be purchased for the concern, and a store be erected thereon," it may be shown, by parol evidence, that a lot, afterwards (in the same year) conveyed by absolute deed to one of the partners, and upon which a store was erected, and used for the partnership business, was purchased and improved with the partnership means, and is partnership property. *Bird v. Morrison et al.*, 188
2. It seems that if the written agreement had not contained any such stipulation, such evidence would have been admissible under the rule of equity then recognized, that a trust in real estate resulted in favor of the party who paid the purchase money therefor. *Ibid.*
3. An agreement for a partnership in dealings in real estate, is within the statute of frauds, and void unless in writing. The fact that the parties making such agreement are engaged at the time in a mercantile partnership, does not take it out of the statute. *Ibid.*
4. Where A, B, C and D were the members of a mercantile copartnership, and D received conveyances from his copartners, by absolute deeds, of divers pieces of real estate, upon which improvements were afterwards made under his direction as ostensible owner, but which were never used for any of the partner-

ship purposes, it is not competent for his copartners to show that such real estate is partnership property, or held upon any trust for their benefit, by proving a *parol* agreement with B, at the time said conveyances were made, that he should hold said real estate (with other real estate previously owned by him) as partnership property, to be improved by their equal contributions, and should reconvey their undivided shares of said property to them upon request, and that the improvements were made with the means of the partnership, or by the equal contributions of its members; the admission of such evidence being contrary to the statute of frauds. *Ibid.*

5. Such an agreement, if proved, did not constitute the parties thereto copartners in the real estate thus conveyed. A mere community of interest in land does not make men partners; there must be some joint adventure, and an agreement to share in the profit and loss of the undertaking. *Ibid.*
6. Where a complaint alleges that defendants are partners, and they fail, within the time allowed by law for an answer, to deny by affidavit the existence of the partnership, in accordance with the statute (sec. 98, chap. 137, Rev. Stat. 1858), they must be deemed to have admitted it. *Fisk v. Tink et al.*, 276
7. The funds of a partnership cannot rightfully be applied by one partner to the discharge of his own separate debt, without the assent, express or implied, of the other partners. *Sauntry v. Dunlap*, 364
9. S. & U. had been partners in business as booksellers, in Mobile, Ala., under the name of "S. & Co.," but in the fall of 1856, their business in that place was broken up by violence, and they were compelled to leave the state, which facts were of public notoriety. Their partnership was thereupon dissolved, and public notice of the dissolution given. In the fall of 1857, S., who had then become engaged in the business of a bookseller at Milwaukee, in this state, which was conducted under the name of "S. & Co." (but in which U. had no interest), bought goods for that trade from a merchant in New York, giving therefor a note signed "S. & Co.," payable to the order of the plaintiff in this suit. The vendor of said goods had dealt with the firm of "S. & Co." at Mobile, during the years 1855-6, and although he had heard of the trouble in their business in that city, and supposed it was the reason why S. removed to Milwaukee, testified that at the time of the giving of the note sued upon, he had no knowledge that the firm of "S. & Co." in Mobile was dissolved, but supposed the firm in Milwaukee to be the same as it was in Mobile: *Held*, that the vendor was not justified in presuming that the firm of "S. & Co." at Milwaukee was the same as the former firm of that name in Mobile, the distance between the places, and the other circumstances of the case, being sufficient to put him upon inquiry in that respect; and that the plaintiff could

not recover against U. upon the note. *Clapp v. Upson*, 493

PAYMENT.

See PLEADINGS, 24, 25.

1. A performed services for the firm of B & C, and had an account against C, individually, for labor, &c., and payments were received by him from C to an amount more than sufficient to pay for the services rendered to the firm, without any direction as to which account the payments should be applied upon, and C, upon the dissolution of his partnership with B, assumed to pay all the firm debts, and afterwards had a reckoning with A, of all the accounts between A and the firm, and himself individually, and promised A to pay him the balance found due, which was less than the amount of his original account against C alone: *Held*, in a suit by A against C to recover said balance, there was no error in making such an application of the payments to the firm debt, as would allow A to recover of C the balance so due and promised. *Robbins v. Lincoln*, 1
2. An instruction given by the court to the jury, in such case, that the plaintiff might recover of C for the firm debt, is no ground for reversing the judgment, which was only for the balance above mentioned, as the same result must have been arrived at by an equitable application of the payments. *Ibid.*
3. Where a sheriff has an execution in his hands against the owner and holder of a note, the maker may pay to such sheriff the amount of the note, or so much thereof as may be necessary to satisfy the execution, and such payment is as valid, under Sec. 90, Chap. 154 of R. S. 1857, as if made directly to the holder of the note. *Dunbar v. Harnsberger*, 378

PLACE OF TRIAL.

See JURISDICTION, 6, 7, 8, 9, 10.

PLEADINGS.

1. A complaint alleged that the "defendant was indebted to the plaintiff for money laid out and expended by the plaintiff for the defendant at his request," giving a large number of items. The answer denied that the "plaintiff had laid out or expended any money for the defendant, except such sums as had been delivered by him to the plaintiff for that purpose." *Held*, that such answer is not a denial, but rather an admission, that the plaintiff paid out the moneys specified in the complaint, with an avoidance of liability for the same, by the averment that the money paid had been furnished to the plaintiff by the defendant for that purpose. *Robbins v. Lincoln*, 1
2. The answer also also averred that "the de-

- fendant had no knowledge or information sufficient to form a belief whether the plaintiff had laid out and expended all the sums of money delivered by the defendant to the plaintiff for that purpose, and therefore had no knowledge, &c., whether he was, or on a final accounting would be, indebted to the plaintiff:" *Held*, that this denial was consistent with the full knowledge that plaintiff had paid out all the moneys alleged in the complaint to have been paid by him, and in strictness of pleading was not such a denial of the paying out of the moneys mentioned in the complaint, as to put the plaintiff upon the proof thereof. *Ibid.*
3. A complaint, under what is commonly called the "Mill Dam Act," alleged that the plaintiff was, and for more than three years had been, the owner in fee, and actually possessed of certain lands therein described; that during all that time he had the right to the use and profits of said land; that the defendant, for more than three years last past, had kept up and maintained, across a stream (not navigable) a mill dam, to raise the water for working a grist mill, &c., by means whereof the water of said stream had, during all that time, been caused to set back upon and overflow the said land, and deprive the plaintiff of the use thereof, which was of the value of \$350 per year, and demanded judgment, that said damages be assessed under the provisions of the statute, &c.: *Held*, that the complaint showed a good cause of action. *Fucille v. Greene*, 11
 4. A complaint, filed in November, 1858, against a railroad company and its lessee, alleged that the defendants had taken and appropriated for the road-bed and other uses of said company, certain real estate of the plaintiff (who was a resident of Wisconsin) without his consent, and had failed, for more than six months after such taking and appropriation, to pay to the plaintiff any compensation therefor, or to take any steps to have the amount of compensation due him therefor assessed; and demanded that the damages to said land, caused by the use and occupation thereof by the defendants, should be assessed, and said railroad company be adjudged to make compensation to the plaintiff for such damages, and that in the meantime and until such compensation were made, the defendants should be enjoined from running cars over said land: *Held*, that the complaint did not contemplate a recovery of damages as for a trespass *quære clausum fregit*, but the assessment of a compensation for the land so taken; and a judgment rendered in such action for damages as for a trespass upon the plaintiff's land, was erroneous. *Intis v. The La Crosse & Mil. R. R. Co. et al.*, 16
 5. Plaintiffs sent to defendant a statement of their account, containing sundry charges, giving defendant credit for sundry payments, and showing a balance due the plaintiffs of about \$400: *Held*, that plaintiffs were not bound, in bringing suit, to declare for the balance of the general account so exhibited, but might select a single item in their account not larger in amount than such balance, and sue therefor; especially as it appeared that the item selected was the only one in the whole account about which there was any dispute between the parties. *Ranney et al. v. Hugby*, 68
 6. In an action by a vendee of goods, against a creditor of the vendor, who caused the goods to be seized under an attachment as the property of the vendor, and against the officer who seized the goods under such attachment, an averment in the answer, that the goods, at the time of such seizure, were the property of such vendor, is sufficient to authorize the introduction of proof showing that the sale under which such vendee claimed title, was fraudulent and void as to creditors. *Adler v. Cole et al.*, 188
 7. A verified answer in an action under the Code, is not evidence for the defendant, as was an answer under oath under the former practice in equity. *Stack v. Sigelkow*, 234
 8. In an action for breach of a contract to make and set up on a steam boat, engines, &c., suitable for propelling the same, averments in the complaint that the defendants failed to complete the work by the time specified in the contract, by reason of which the plaintiff was deprived of the earnings of the boat during the period of such delay, and that upon trial the engines, &c., proved unsuitable and defective, by reason of which the plaintiff was compelled to expend large sums in repairs and was deprived of the use of said boat while making the same, and finally was obliged to remove said engines from the boat, and purchase and put in new ones at a large expense, and lost the earnings of said boat during the time necessary to make such change, and lost also the wages of the officers and hands employed on the boat during the time so spent in making repairs and changes, are not statements of several distinct causes of action, or of separate demands upon different contracts, but of several breaches of one contract, and the plaintiff may at the trial give evidence concerning any or all of them. *Fisk v. Tank et al.*, 276
 9. In an action on such a contract, the complaint failed to describe the contract truly, by omitting a stipulation therein that if the work should in any manner fail to answer the purposes intended, or prove defective on a trial of twenty days under an engineer approved by one of the defendants, it was to be made good by repairs of defects: *Held*, that under the present system of pleading and practice, the variance was properly regarded as immaterial, it appearing that a copy of the contract as proved was served upon the defendants' attorney some months before the trial, so that he could not have been misled or taken by surprise. *Ibid.*
 10. A statement in a bill of revivor that the com-

- plainants therein are the heirs at law of the complainant in the original bill, who has died intestate, is a sufficient allegation of heirship, without a more minute statement of the facts which show them to be such heirs. *Fullitt et al. v. Robbins*, 819
11. Where averments, however defective, are sufficient to inform the opposite party fully of the facts intended to be proved, an amendment to such averments allowed at the trial for the purpose of remedying their defects, will not constitute such a surprise upon the opposite party as will entitle him to a continuance of the cause, even though he may have relied upon such defects to obtain a judgment. *Ibid.*
12. In an action by the assignee of a note against the maker, averments that the defendant made the note, and that the payee indorsed it to the plaintiff, who is the lawful holder, and that the defendant is indebted to the plaintiff in the amount thereof, are sufficient without any further allegation of the delivery of the note by the maker to the payee, or by the payee to the plaintiff. *Burbank v. French et al.*, 376
13. Where an action has been brought for damages for the wrongful erection and maintenance of a mill dam, and also for an injunction against the further maintenance of such dam, the plaintiff should not be allowed at the trial to amend his complaint, so as to make it conform to the provisions of the mill dam law, and proceed for the recovery of compensation under that law. *Newton v. Allis*, 378
14. Action on a usurious contract. Plea, payment of the principal sum loaned, and usury: *Held*, that the defendant, on proof of such payment, was entitled to the benefit of his plea of usury, under section 6, chapter 61, R. S., 1858. *Moyer v. Gunn*, 385
15. A counter claim, unless denied, is admitted. *Ibid.*
16. Where a trespass is relied on as the cause of action, it should be so distinctly set forth that it may be seen with reasonable certainty what is the principal act complained of, and what is mere matter of aggravation. *Clark et al. v. Langworthy*, 441
17. Where facts which might be relied on as constituting several different causes of action, were stated in one count, in such a manner that the defendant could not determine which cause of action the plaintiff intended to rely upon, nor to which he was bound to answer, the circuit court, on motion of the defendant, should have required the complaint to be made more definite and certain. *Ibid.*
18. The words "legal interest," when used in pleadings, may mean either the highest rate allowed by law on special contract, or that which is fixed by law in the absence of such contract; and where the context clearly shows that they are used in the former sense, they ought not to be construed in the latter. *Towles v. Durkee et al.*, 480
19. Since the usury act of 1859, it is not necessary that a defendant should either aver or prove a tender of the principal sum loaned, in order to avail himself of the defense of usury. *Ibid.*
20. The complaint in a suit brought in a corporate name, need not aver the plaintiff to be a corporation. *Central Bank of Wisconsin v. Knowlton et al.*, 624
21. Where the summons and complaint in an action showed that A was the plaintiff, and that he had a cause of action as the assignee of B, a statement that B was the plaintiff (occurring in a printed form which was used in drawing up the complaint) should be rejected as surplusage, and is not a ground of demurrer. *Kimball v. Spicer*, 666
22. It is not necessary in a pleading to aver that a corporation whose name only has been changed, retains, under its new name, its former rights. *Ibid.*
23. A complaint averred that the written promise sued upon had been assigned by the promisee to the plaintiff, who thenceforth continued "to hold, own and possess the same for the benefit of" a certain bank, and was entitled to the sum due "for the benefit of" said bank: *Held*, on demurrer, that the plaintiff was entitled to bring the action in his own name, as a trustee of an express trust. *Ibid.*
24. Complaint on an account alleged to have been due by the defendant to a certain firm, who assigned it (in 1857) to the plaintiff, of which assignment the defendant had notice. Answer, that defendant had not "sufficient information to form a belief," whether said account had been assigned to the plaintiff, and that the defendant (in 1858) settled said account with one of the partners, who was the authorized agent of the firm, and gave his negotiable note for the balance due thereon, which had been transferred to some third person: *Held*, on demurrer, that the answer did not contain a sufficient denial of the assignment. Such denial should have been of either knowledge or information sufficient to form a belief, &c. *Hastings et al. v. Gwynn*, 671
25. *Held*, also, that whether the answer would have shown a good defense or not, if it had alleged that the execution of said note was before notice of the assignment of said account, it was clearly defective in not containing that allegation. *Ibid.*

PLEDGE.

See MORTGAGE OF REAL ESTATE, 5.

1. A pledgor of personal property may waive the notice of sale to which, by law, he would otherwise be entitled. *Mowry v. Wood*, 413

2. If the agreement upon the subject is in writing, it is for the court to determine whether notice is waived. *Ibid.*
3. *It seems* that a waiver of notice of sale in such case does not dispense with the necessity of a demand of payment before a sale of the pledge. *Ibid.*

PRACTICE.

See AMENDMENT, 1.
 CRIMINAL LAW, 1-8, 10, 11, 13-18, 23, 24.
 DEPOSITION.
 MORTGAGE OF REAL ESTATE, 3, 4.
 PAYMENT, 2, 3.
 PLEADINGS, 6, 7, 9, 11, 13, 17, 19.

1. A judgment will not be reversed on account of the improper admission of a deposition, where it appears that the verdict of the jury who tried the case, could not properly have been different if the deposition had been excluded. *Robbins v. Lincoln*, 1
2. Where a sheriff is of opinion that the property of an execution defendant will not sell for enough to pay the expenses of the sale, he may, at his peril, refuse to levy upon it, and stating the facts, return the execution unsatisfied; and such return is *prima facie* sufficient to authorize the issuing of an execution against the person. *In re Mourry*, 52
3. Where a motion is made during the progress of a cause, it is irregular to order that the costs allowed on a denial of the motion be entered in the final judgment in the action. The payment of such costs is to be enforced by a special proceeding, to be taken according to the provisions of chapter 149 of the Revised Statutes of 1853. *Van Ness et al. v. Corkins*, 136
4. A judgment may be entered against any one or more of several defendants, wherever a several suit might have been brought, or a several judgment upon the facts of the case would be proper; and that without regard to the character of the complaint, and whether it alleges a joint or several liability. *Ibid.*
5. The provision of the statute in force in 1838, requiring the judge to sign the record at the end of each day's proceedings, was directory, and such record is admissible in evidence, and a judgment entered therein valid, though not so signed by the judge. *Eastman v. Hartseau*, 267
6. Where a complaint alleges that defendants are partners, and they fail, within the time allowed by law for an answer, to deny by affidavit the existence of the partnership, in accordance with the statute (sec. 93, chap. 137, Rev. Stat. 1853), they must be deemed to have admitted it. *Fisk v. Tank et al.*, 276
7. Amendments to pleadings rest upon the sound discretion of the court before which the case is tried, and will not be reviewed on error or appeal, except in cases where the discretion has been manifestly abused. *Gillett et al. v. Robbins*, 319
8. A statement upon oath of the defendant, in his answer to a bill in equity, may be overcome by the testimony of two or more witnesses, to admission of the defendant inconsistent with such statement. *Ibid.*
9. The words "personal service," in section 27, chapter 132, R. S., 1853, mean service by delivery of a copy of the summons and complaint, or of the summons only (as the case may be), to the defendant *personally*. In case of service by copy left at the defendant's place of abode, the plaintiff should apply to the court for judgment. *Moyer v. Cook*, 335
12. Where a judgment has been entered by the clerk under that section, and a motion made to set aside the judgment, on the ground that there had not been a personal service of the summons, leave should be granted for the sheriff to amend his return, if an amendment thereof, according to the facts, would show such personal service. *Ibid.*
13. Where an issue is made between the plaintiff in an attachment suit and a garnishee, upon the answer of the latter, *it seems* that such answer is never admissible in evidence on the trial of such issue; but where, under the law allowing parties to be witnesses in their own behalf, the garnishee caused his own deposition to be taken and read on the trial of such issue, there was clearly no error in excluding his answer as evidence. *Keep v. Sanderson*, 352
14. Where a judge files a finding, which is excepted to as not being in accordance with the requirements of the Code, he has power to file an amended finding, and the time and manner of his doing so must depend, in a great measure upon his discretion. *Ibid.*
15. Where the finding of the court sets forth at large the assignment under which a garnishee received the property for which he is sought to be made accountable, and that assignment is "by its very terms, fraudulent in law and in fact," the invalidity of the assignment sufficiently appears by such finding. *Ibid.*
16. A judgment will not be reversed on account of the refusal of the court to grant a new trial, unless the refusal was excepted to. *Webster v. Modlin et al.*, 363
17. Where the record does not show that such exception was taken, the affidavit of counsel will not be received to supply the defect, especially while the judge before whom the trial was had, is living. *Ibid.*
18. Where an action has been brought for damages for the *wrongful* erection and maintenance of a mill dam, and also for an injunction against the further maintenance of such dam, the plaintiff should not be allowed at

- the trial to amend his complaint, so as to make it conform to the provisions of the mill dam law, and proceed for the recovery of compensation under that law. *Newton v. Allie*, 378
19. Where property was offered for sale by a sheriff under a judgment of foreclosure, and struck off to a person who bid by the direction of the plaintiff's attorney, and who showed the sheriff a note from said attorney, stating that the bid was satisfactory to him, and that he would give a receipt to the sheriff for the amount: *Held*, that although the sheriff might have demanded his fees in advance, yet, not having done so, he had no right to disregard the bid, and proceed to resell the property, because such bidder was not prepared at the moment to pay his fees and disbursements. *Lane et al. v. White*, 381
20. Action on a usurious contract. Plea, payment of the principal sum loaned, and usury: *Held*, that the defendant, on proof of such payment, was entitled to the benefit of his plea of usury, under section 6, chapter 61, R. S. 1858. *Moyer v. Gunn*, 385
21. A counter-claim, unless denied, is admitted. *Ibid.*
22. The practice of proving by a witness the amount computed by him to be due upon a note, when the note itself is before the jury, who can determine for themselves whether the computation is correct or not, is referred to without disapproval. *Ibid.*
23. A party to an action cannot recover fees for his own attendance and mileage, as a witness therein in his own behalf. *Grinnell v. Deming et al.*, 402
24. Where facts which might be relied on as constituting several different causes of action, were stated in one count, in such a manner that the defendant could not determine which cause of action the plaintiff intended to rely upon, nor to which he was bound to answer, the circuit court, on motion of the defendant, should have required the complaint to be made more definite and certain. *Clark et al. v. Langworthy*, 441
25. From an order denying such motion, an appeal lies. *Ibid.*
26. Where there is a variance between the contract alleged in a complaint, and that proven on the trial, of such a nature that if the objection had been taken on the trial, the court below might properly have allowed an amendment to make the complaint conform to the facts, and the evidence was admitted without objection, the judgment of the court below will not be reversed on account of such variance. *Gee v. Swain*, 450
27. Since the usury act of 1859, it is not necessary that a defendant should either aver or prove a tender of the principal sum loaned, in order to avail himself of the defense of usury. *Tousses v. Durkee et al.*, 480
28. Where an appeal, taken from an order of a county court, sitting as a court of probate, to a circuit court, has been heard by the latter on the merits, a judgment must be rendered therein, affirming or reversing, in whole or in part, the order appealed from, or making such other order as the county court ought to have made; and it is error for the circuit court to *dismiss* the appeal on the ground that no sufficient reason appears for reversing such order. *In re Newland and Daniels*, 490
29. Where a sheriff returned an execution "no property," after holding it forty days, but before its regular return day, and there appeared upon the execution, beneath such return, and of the same date, a direction from the plaintiff's counsel to the sheriff, in these words, "Return as above, after diligent search:" *Held*, that the return was a sufficient foundation for supplementary proceedings, there being nothing in such return to indicate a want of good faith in the effort to reach the debtor's property upon the execution. Case of *Remington*, 7 Wis., 346, distinguished. *The Second Ward Bank v. Upmann*, 499
30. Where it appears upon supplementary proceedings, that the judgment debtor has property liable to execution sufficient to satisfy the judgment, the court has no authority to appoint a receiver. *Ibid.*
31. The objection that one of the grand jurors who found an indictment, was an alien, cannot be taken advantage of after a plea to the merits, although the disqualification was not known to the defendant until after such plea was filed. *Byrne et al. v. The State*, 519
32. Whether the law requires a summons, under the present practice, to be tested, *quære*. *Rahn, administrator, v. Gunnison*, 522
33. A summons in an action in a county court was tested in the name of the judge of the circuit court for that county: *Held*, that the matter of the attestation did not involve "the merits of the action or any part thereof," nor "affect a substantial right," and that an appeal does not lie from an order denying a motion to strike out the summons and complaint for irregularity and inconsistency, and to set aside a judgment regularly entered in such action for want of an answer. *Ibid.*
34. Where a motion to open a judgment and allow the defendant to answer, was denied, but no appeal was taken from the order denying the motion, the order is not before this court for review. *Ibid.*
35. This Court cannot take notice of proceedings had upon the trial of a criminal action, although the minutes of them, as taken by the clerk or judge, are returned by the clerk as a part of the record. They must be embraced in a bill of exceptions in order to become a part of the record or be entitled to notice. *Peglow v. The State*, 634

36. A statement in the record in these words, "Prisoner in court, and sentenced by the court as follows: That the said F— P— be sentenced to state's prison," &c., purports to be merely a recital or memorandum by the clerk, and cannot be regarded as the record of a judgment of a court. *Ibid.*
37. If a sentence of imprisonment in the state prison omits to direct that the convict be punished by confinement at hard labor, it is erroneous. *Ibid.*
38. In such a case this court remits the record to the court below, with a direction that it proceed to give judgment upon the conviction according to law. *Ibid.*
39. A sentence in these words, "The court sentences the prisoner as follows: that the said F— F— be punished by confinement in the state prison," &c., though lacking in formality, purports to be the judgment of the court, and is sufficient. *Frans v. The State*, 536
40. A party bringing a civil action to this court, must furnish for the judges a printed case, consisting of a brief abstract of the return of the clerk, and containing all the evidence, pleadings and exhibits bearing upon the questions of law and fact to be reviewed. When such printed case is not furnished, the court will dismiss the writ of error or appeal, in their discretion, as indicated by rule 22 of this court. *Wilcox v. Hathaway*, 543
41. A writ of error should be returned by the inferior court or the clerk thereof, with the record, and in order that it may be so returned, the writ itself should be left in the custody of the inferior court. *Rolke v. The State*, 570
42. Where a writ of error was served by delivering an attested copy thereof to the judge and clerk of the inferior court, and showing them the original, and the judge annexed to such copy, and certified up under the seal of his court, a transcript of the indictment and proceedings in the cause (the original writ being filed in this court by the attorney of the plaintiff in error, with proof of such service), it was held, that the record had not been duly brought into this court, and that the writ of error should be dismissed. *Ibid.*
43. Where it appears from the record that the circuit judge instructed the jury that the presumption of guilt arising out of the unexplained possession of property recently stolen is one of law, but the record does not purport to contain all the charge given to the jury, this court may presume that, in omitted portions of it, the judge properly explained the nature of the presumption, leaving the jury to determine its force. *Graves v. The State*, 591
44. It is the practice in this court not to review questions involved in instructions to the jury at the circuit, where it appears that the attention of the circuit judge was not fairly and explicitly called to them. *Ibid.*
46. A judgment will not be reversed, on account of the refusal of the court below to grant a new trial, if there was evidence enough to support the verdict, although it may appear to this court that the preponderance of the proof was against it. *Lockwood v. Stewart et al.*, 623
47. In an action to foreclose a mortgage given by a husband and wife to secure the payment of their bond (executed by her during coverture), it is erroneous to render a personal judgment against the wife as well as the husband, for any deficiency which may remain due after the sale of the mortgaged premises, unless it is shown in the complaint that the contract related to her separate property, and was one upon which she might become liable to a personal judgment. *Rogers v. Weil et al.*, 664
48. That part of the judgment of the inferior court, which is against the wife personally for such deficiency, may be reversed, and the residue of the judgment be affirmed. *Ibid.*
49. The last clause of sec. 29 of the Code, which declares that if the county designated as the place of trial in the complaint "be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county," relates not only to what precedes it in the same section, but also to the preceding sections, 27 and 28, of the Code, and qualifies their meaning. If a defendant fails so to demand that the trial be had in the proper county, it may be had in the county designated in the complaint. *Perles v. Albert et al.*, 686
50. An action was brought in the circuit court of Milwaukee county, to foreclose a mortgage on land lying in Washington county, and process was served on one of the defendants in Milwaukee county, and on the other in Washington county, where they respectively resided. The defendants did not appear to the action. *Held*, that the circuit court of Milwaukee county had jurisdiction of the action, and could render judgment of foreclosure therein. *Ibid.*
51. Where, in an action against a vessel for seaman's wages, before a justice of the peace, the complaint, which was in writing and signed by the plaintiff, was verified only by the following *jurat* added thereto: "Subscribed and sworn before me, this, &c.," signed by the justice before whom said suit was brought, and the master of the vessel appeared and admitted a certain sum to be due the plaintiff, for which judgment was accordingly rendered: *Held*, that if there was a defect in the verification of the complaint, which would otherwise have been fatal, it was cured by the master's appearing and going to trial, without

objection to the complaint. *Anderson et al. v. Morris*, 689

PROBATE JUDGE.

See ADMINISTRATORS AND EXECUTORS.

PROMISSORY NOTES.

See ACTION, 8.
COMMERCIAL LAW, 2, 7, 8, 9, 10.
PAYMENT, 3.

R

RAILROADS.

See COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USES.
CONDITION, 1.
CORPORATIONS.
MORTGAGE OF REAL ESTATE, 17.
STOCK SUBSCRIPTIONS.

1. A railroad company whose charter gives it the general power to make all contracts which its convenience or interest may require, has power, in carrying out the enterprise authorized by its charter, to assign its stock subscriptions, there being nothing in the charter imposing any restriction in that respect. *Downie v. Hoover*, 174
2. A secret agreement between the agent of a railroad company and a person subscribing for its stock, that the sum so subscribed should never be collected, or that it might be discharged in something of less value than the amount expressed in the subscription, is a fraud upon the other stockholders, and payment of the amount subscribed will be enforced without regard to such agreement. *Downie v. White*, 176
3. The act to amend the charter of the "Fox River Valley Railroad Company," approved March 11, 1859, changed the name of that company, and made some amendments to its charter, but did not create a new corporation. *Mil. & N. I. R. R. Co. v. Field*, 340
4. The provision in the amendatory act, requiring that all moneys received by said corporation should be faithfully and exclusively applied by the "Milwaukee and Northern Illinois Railroad Company," the same as under its former title, to the construction of its line of road from Milwaukee to the state line, &c., must be understood as referring to the line established by the original charter. *Ibid.*
5. That provision does not operate to prevent the building of the road from Rochester to Waushara, as authorized by the original charter, but amounts merely to a legislative postponement of the construction of that part of the road, until the road from Milwaukee to the state line shall be completed. *Ibid.*

6. The agreement on the part of the company to pay interest on the stock subscribed and paid for, until twelve miles of the road should be completed, was not beyond the power conferred upon the directors by the 6th section of the charter, "to make such covenants, contracts and agreements with any person, &c., as the construction and management of the work, and the convenience and interest of the company, may [might] require." *Ibid.*

RECEIVER.

See JURISDICTION, 3, 5.

S

SCHOOL LAND CERTIFICATES.

See MORTGAGE OF REAL ESTATE, 5, 6, 13, 14, 15.

1. An assignment of a school land certificate in blank (i.e. where the name of the assignee is omitted), is not a transfer of the certificates at law. *Mowry v. Wood*, 413
2. The nature of the estate created by school land certificates, with reference to descent, dower, lien of judgments, and liability to sale on execution, discussed *per* Dixon, C. J. *Ibid.*

SHERIFF.

See PRACTICE, 2, 19.

SPECIFIC PERFORMANCE.

See EQUITY, 8, 9.

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION.

The power conferred by law upon the state superintendent of public instruction, to examine and decide appeals from the decisions of school district meetings, or from the decisions of town superintendents, in forming or altering, or refusing to form or alter, school districts, is a quasi judicial power, which cannot be delegated to the assistant state superintendent. *Joint School District, &c., v. Wolfe et al.*, 685

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1852. Chapter 56, Charter of the City of Milwaukee. Effect of extending the limits of the city so as to include lands belonging to the Town of Milwaukee, 95

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- " 71, sec. 20. Taxation of Banks, 48
- " 79, sec. 34. Rolling Stock of Railroads, Fixtures, 663
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- " 117, sec. 46. Jurisdiction of County Courts, 504
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STOCK SUBSCRIPTIONS.

See CONDITION, 1.
CORPORATIONS, 1.
RAILROADS, 6.

1. A subscription for stock of a railroad company is not invalid merely because it is conditional, if the condition itself is not of such a character as to make the agreement void on the ground of public policy. *Racine Co. Bank v. Ayers*, 512
2. Such a subscription is not invalid because made payable upon condition of the location of a depot of the road in a particular part of a town through which the road is to pass. *Ibid.*
3. Such a subscription is not invalid because it contains a stipulation on the part of the company that the amount paid thereon shall bear interest until dividends shall be declared from the earnings of the road. *Ibid.*
4. A railroad company may assign a stock subscription, or the amount due or to become due thereon. *Ibid.*

SUBSCRIPTION TO VOLUNTARY ASSOCIATIONS.

See EQUITY, 10.

SUMMONS.

See PRACTICE, 8, 32, 33.

SUPPLEMENTARY PROCEEDINGS.

See PRACTICE, 29, 30.

T
TAXES.

See BANKING LAW, 2, 3.
CITIES, 3, 4, 6, 7, 9, 10.

TOWNS.

See CONSTITUTIONAL LAW, 5, 6, 7, 8.

TRUSTS.

See PARTNERSHIP, 1, 2, 3, 4.

U
USURY.

See PRACTICE, 27.

1. Action on a usurious contract. Plea, payment of the principal sum loaned, and usury: *Held*, that the defendant, on proof of such payment, was entitled to the benefit of his plea of usury, under section 6, chapter 61, R. S., 1858. *Moyer v. Gunn*, 335
2. Certain land mortgaged by A to B was advertised for sale on a judgment of foreclosure, and just before the day of sale, C (a stranger to the mortgage) represented to B that he had become interested in the property, desired to help A, was acting in concert with him, and, for the purpose of making all he could out of the property, requested B to put off the sale, and give him an opportunity to sell portions of the land to various purchasers; and a verbal agreement was then made between them, that the sale should be postponed one year; that in the meantime C might sell portions of the property for one half cash and the balance in twelve months on mortgage, and B would release such portions from the lien of the decree, taking the cash derived from such sales, and an assignment of the mortgages; and that C, in consideration thereof, should pay all the expenses of the foreclosure (including a solicitor's fee of \$100), and in computing the amount due on said mortgage, should add to the 12 per cent. interest therein reserved, interest at the same rate upon the annual installments of interest which had accrued thereon, from the time they severally fell due, and should pay the same rate of interest upon the whole amount found due on the mortgage by that computation, until the same should be paid. Sales of portions of the land were made by C, and portions of the proceeds paid to B, the first of which payments was made on the 18th of May, 1856, and was applied by B, in pursuance of said agreement, but the mortgages given to C by the purchasers were not assigned to B, for which reason B did not release the land sold from his mortgage. About a year after the above verbal agreement was made, to a request of B that the contract should be put in writing, C answered, that A himself would come and arrange it, and A called soon after and executed a

written agreement, signed by himself alone, and ante-dated May 13, 1856, by which he promised to pay 12 per cent. interest on the balance remaining due on the decree, after applying thereon, and in payment of said expenses of foreclosure, the payment made on the day last mentioned, which balance was computed in said agreement according to the terms of said verbal contract between B and C. On a motion by C to compel the sheriff, who had again advertised said land for sale on the decree, to receive, in satisfaction thereof, the amount which would be due thereon according to its terms, without reference to said verbal or written agreement: *Held*, that if the agreement to pay the compound interest could not have been enforced while it was executory, on the ground that contracts to pay more than seven per cent. interest are required by the statute to be in writing, yet as C, through A as his agent, had assented to the application of the first payment to the discharge of that interest, that application should not be disturbed. *Mosher v. Chapin*, 453

8. *Held*, also, that the agreement in relation to the compounding of the interest was not usurious. *Ibid.*

3. *Held*, also, that the stipulation to pay the expense of foreclosure, including a solicitor's fee, did not make the contract usurious. *Ibid.*

4. Whether the facts disclose a consideration distinct from the forbearance of the debt, which would sustain an independent agreement on the part of C to pay a sum greater than that allowed by law to be taken for interest, *quære*. *Ibid.*

5. Where a lender made it a condition of a loan in this state, that the borrower should pay exchange on New York, in addition to the highest rate of interest allowed by law on special contract, and this was done solely for the purpose of obtaining such excess, and with the understanding that the note was not to be paid in New York, but in this state: *Held*, that the contract was usurious. *Townlee v. Durkee et al.*, 480

6. *Rock River Bank v. Sherwood*, 10 Wis., 230, cited and distinguished. *Ibid.*

7. A note made in this state, payable in New York, with interest at a rate allowed by the laws of this state, but not by those of New York, is not usurious, when the contract is made in good faith and not for the purpose of avoiding the usury laws. *Richards et al. v. The Globe Bank*, 692

8. Where a note made in this state by residents thereof, payable in New York, with interest at 10 per cent., was negotiated for money to be used in this state, and was purchased by a bank in this state, and sold by it in New York, and A, one of the makers of said note, when it was about maturing, made an arrangement in New York, with the president of said bank, (both being temporarily in that city), in pursuance of which the other makers of said note executed in this state, to said bank, a new note for the same amount, with interest

at the same rate, payable also in New York, and the bank thereupon forwarded said new note to New York to be signed by A, (who accordingly signed it in that city), and also forwarded its draft on New York to take up the old note, charging the makers of said note the current rate of exchange on said draft: *Held*, that the new note thus given was governed by the law of this state, and was not usurious because it provided for the payment of a higher rate of interest than was allowed by the law of New York. *Ibid.*

9. *Held*, also, that inasmuch as said bank had ceased to be the owner of the first note, its charge of exchange upon the draft which was used to take up the same, did not render the transaction usurious. *Ibid.*

V

VARIANCE.

See PRACTICE, 6, 26.

VENUE.

See PLACE OF TRIAL.

VESTED RIGHTS.

See ACTION, 1.

CONSTITUTIONAL LAW, 5, 6, 7, 8.

W

WARRANT OF ATTORNEY TO CONFESS JUDGMENT.

A judgment was entered upon a note, under a warrant of attorney, which was a separate instrument, but upon the same sheet of paper as the note, and described the note correctly, except that it referred to the same as bearing even date with the warrant, while the warrant itself (which was filled up from a printed blank), was *without a date*: *Held*, that the judgment ought not to be vacated on the ground that the warrant did not sufficiently identify said note as the one on which judgment was authorized to be entered, it appearing that said note was the one intended to be described in the warrant. *Richards et al. v. The Globe Bank*, 692

WITNESS FEES.

See PRACTICE, 23.

WRIT OF ERROR.

See APPEAL, 4.

PRACTICE, 42, 43.

WRONG NAME.

See CONVEYANCE, 1, 2.
CORPORATIONS, 1.

Ex. 3. a. a.

ERRATA.

- On page 188, twenty-sixth line from top, for "174" read "184."
On page 255, twelfth line from bottom, for "complaints" read "compliments."
On page 275, seventh line from top, for DIXON, C. J., read PAINE, J.
On page 278, twenty-third line from top, for "defendant" read "vendee."
On page 461, fourth line from bottom, for "1855" read "1859."
On page 462, third line from top, for "the day last mentioned," read "said 13th of April, 1859."
On page 533, eleventh line from top, for "sections 7 and 4," read "sections 7 and 8."
In the case of the *State ex rel. Spaulding vs. Elwood*, page 554, the names of counsel, to-wit, "*A. D. Smith* and *Samuel Crawford*, for relator; *E. G. Ryan*, for respondent," were inadvertently omitted.
On page 596, first line of syllabus, and page 597, thirteenth line from top, for "320" read "23."
On page 737, at the end of the proposition under "Judgment," insert "*Richards et al. v. The Globe Bank*, 692."

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